

CA26N
AJ 710

-79P65

The Report of The Professional Organizations Committee

April, 1980

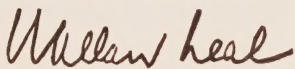
Letter of Transmittal

April 17, 1980

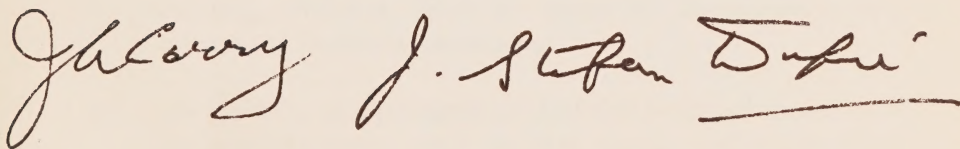
To: The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario

Sir:

We, the undersigned members of The Professional Organizations Committee appointed by you in May, 1977 to study the administration of certain statutes dealing with professional and self-governing organizations in Ontario, have now the honour to submit our Report.



H. Allan Leal



J. Alex Corry

J. Stefan Dupré



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

Terms of Reference of The Professional Organizations Committee

By letter of April 6, 1976 to the Ontario Law Reform Commission, the Attorney General of Ontario requested a review of statutes governing the professions of public accounting, architecture, engineering, and law "with a view to making recommendations to the Government for comprehensive legislation setting the legal framework within which these professions are to operate." The reference asked for a review of the following statutes:

1. *The Architects Act*
2. *The Law Society Act*
3. *The Notaries Act*
4. *The Professional Engineers Act*
5. *The Public Accountancy Act*

and in particular the following issues:

- (1) the appropriateness of the existing division of functions and jurisdiction of these professional groups; for instance, the appropriateness of the dividing line between architecture and engineering in the design of buildings;
- (2) the possible creation of new professional groups and sub-groups or the amalgamation of groups within these professions; for instance, the possible abolition of the existing division between chartered accountants and accredited public accountants;
- (3) the need for the recognition and definition of the roles of paraprofessionals, such as law clerks and engineering technologists, and the appropriateness of the possible creation of new governing bodies for these groups;
- (4) the amount of control these professional groups should have over the training and certification of their members;
- (5) the appropriateness of permitting members of these professions to incorporate their practices;

- (6) any incidental questions raised by the foregoing issues.

On November 1, 1976, the Attorney General supplemented these terms of reference with the request to review:

. . . the appropriateness of the requirement of Canadian citizenship or British subject status as a condition of membership in a professional body.

The Professional Organizations Committee

Committee Members

H. Allan Leal,
Chairman

J. Alex Corry,
Committee Member

J. Stefan Dupré,
Committee Member

Administrator

Linda Kahn

Research Directorate

Michael J. Trebilcock,
Research Director

Carolyn J. Tuohy,
Associate Research Director

Alan D. Wolfson,
Associate Research Director

Support Staff

Phyllis Bartley,
Secretary

Selma Colvin,
Research Officer (1976-78)

Vicki Krangle,
Secretary

Donald Milner,
Research Officer (1978-79)

J. Marc Sievers,
Research Officer (1976-78)

Janet Yale,
Research Officer (1976-78)

Table of Contents

| | |
|---|--------|
| Letter of Transmittal | i |
| Terms of Reference of The Professional Organizations Committee | iii |
| The Professional Organizations Committee | v |
| Foreword | xv |
| Chapter 1 Process, Principles, and Prescriptions | 1 |
| A. A Somewhat Different Process | 1 |
| B. A Set of Principles | 7 |
| B.1 The Protection of Vulnerable Interests | 7 |
| B.2 Fairness of Regulation | 11 |
| B.3 Feasibility of Implementation | 13 |
| B.4 Public Accountability of Regulatory Bodies | 15 |
| C. Prescriptions for Ontario | 17 |
| Chapter 2 The Structures and Processes of Professional Self-Government | 25 |
| A. Introduction | 25 |
| A.1 The Balance of Public and Professional Authority | 25 |
| A.2 The Case of the Legal Profession | 25 |
| A.3 Recent Currents of Change | 26 |
| B. Lay Representation | 29 |
| C. Individual Rights Before Professional Governing Bodies | 32 |
| C.1 Complaints and Disciplinary Procedures | 32 |
| C.2 Internal Procedures | 35 |
| C.3 External Appeal | 39 |
| C.4 Refused Applicants | 44 |
| D. Ministerial Responsibility | 45 |
| D.1 Review of Regulations | 45 |
| E. The Appropriate Subject Matter of Statutory Prescriptions, Regulations, and Bylaws | 46 |
| E.1 Control of Entry, Exit, and Conduct of Individuals | 48 |
| E.2 The Constitution, Internal Government, and Administration of Professional Bodies | 54 |

| | | |
|-----|--|----|
| E.3 | Residual Matters | 57 |
| E.4 | Summary | 57 |
| F. | Annual Reports | 62 |
| G. | Periodic Review | 64 |
| H. | A Special Consideration: the Distinction Between Member Service and Regulatory Activities | 65 |

| | | |
|------------------|--|-----------|
| Chapter 3 | Legal Services and the Licensed Practice of Law | 69 |
| A. | The Licensure Regime in Law | 69 |
| B. | “Routine” Services | 72 |
| C. | Paraprofessionals: Law Clerks and Legal Secretaries | 74 |
| D. | Paraprofessionals: Community Legal Clinic Workers | 76 |
| E. | Notaries Public | 78 |

| | | |
|------------------|--|-----------|
| Chapter 4 | The Relations Between Professionals and Technical Personnel in Engineering and Architecture | 81 |
| A. | The Interface Between Professionals and Technical Personnel | 81 |
| A.1 | Engineering | 81 |
| A.2 | Architecture | 90 |
| B. | Bridging Provisions | 91 |
| B.1 | Engineering | 91 |
| B.2 | Architecture | 94 |
| C. | Certification of Technical Personnel in Engineering and Architecture | 97 |

| | | |
|------------------|---|------------|
| Chapter 5 | The Interface Between Architecture and Engineering | 101 |
| A. | The Scope of Practice Dispute | 101 |
| B. | The Agreement Between the Representatives of the OAA and the Representatives of the APEO | 105 |
| C. | The Merits of the Agreement | 110 |
| D. | Implementing the Agreement | 116 |
| D.1 | Prime Consultancy | 116 |
| D.2 | Definition of Buildings | 117 |

| | | |
|-----|-------------------------------|-----|
| D.3 | Certificates of Authorization | 119 |
| D.4 | The Joint Practice Board | 121 |
| E. | Longer-Term Considerations | 123 |

| | | |
|------------------|---|-----|
| Chapter 6 | The Accounting Profession | 125 |
| A. | The Politics of Organizational Insurgency | 125 |
| B. | Alternative Resolutions | 131 |
| B.1 | De-licensing Public Accounting | 132 |
| B.2 | Government Licensing of Public Accounting | 134 |
| B.3 | The Institute of Chartered Accountants of Ontario as Sole Licensing Body | 136 |
| B.4 | The British Columbia Licensure Regime | 139 |
| C. | A Proposed Resolution | 141 |

| | | |
|------------------|---------------------------------------|-----|
| Chapter 7 | Citizenship and Transfer Rules | 157 |
| A. | Citizenship | 157 |
| B. | Transfer Rules | 158 |

| | | |
|------------------|--|-----|
| Chapter 8 | Incorporation of Professional Practices | 163 |
|------------------|--|-----|

| | | |
|------------------|---|-----|
| Chapter 9 | Continuing Competence | 171 |
| A. | The Nature of the Issues | 171 |
| B. | Civil Liability | 173 |
| B.1 | Insurance Arrangements | 176 |
| B.2 | Limitation Periods | 177 |
| C. | The Disciplinary Process | 180 |
| D. | Periodic Re-examination and Mandatory Continuing Education | 187 |

| | | |
|-------------------|--|-----|
| Chapter 10 | Professional Advertising | 189 |
| A. | Advertising in the Accounting, Architectural, and Engineering Professions | 189 |
| B. | Advertising in the Legal Profession | 191 |
| B.1 | Defining the Public's Information Needs | 191 |
| B.2 | Non-Price Advertising | 193 |
| B.3 | Price Advertising | 194 |

| | |
|---|---------|
| Chapter 11 Professional Fees | 203 |
| A. Fee Schedules | 203 |
| B. Fee Disclosure | 205 |
| C. Fees Mediation Mechanisms | 206 |
| D. Special Payment Mechanisms in Law | 207 |
| D.1 Contingent Fees | 207 |
| D.2 Prepaid Legal Service Plans | 212 |
| Chapter 12 Employee Professionals | 217 |
| Chapter 13 Certification and Licensure Claims By Occupational Groups | 221 |
| A. Demands for Professional Status | 221 |
| B. Responding to Demands for Professional Status | 223 |
| C. A New Certification System for Ontario | 229 |
| D. The Evaluation of Licensure Claims | 233 |
| Chapter 14 Summary of Recommendations | 235 |
| Appendices | 261 |
| Appendix A Description of Professional Organizations | 263 |
| A. Accounting | 263 |
| B. Architecture | 266 |
| C. Engineering | 267 |
| D. Law | 269 |
| E. Notaries | 271 |
| Appendix B List of Participants in Professional Organizations Committee Liaison Meetings | 272 |
| Appendix C List of Professional Organizations Committee Working Papers, Internal Working Documents, and Appendices to the Research Directorate's Staff Study | 273 |
| Appendix D List of Organizations and Individuals Submitting Preliminary Briefs to the Professional Organizations Committee, 1976 | 276 |

| | | |
|------------|--|-----|
| Appendix E | List of Organizations and Individuals Submitting Intermediate Briefs to the Professional Organizations Committee, 1977 | 279 |
| Appendix F | List of Organizations and Individuals Submitting Final Briefs to the Professional Organizations Committee, 1979 | 282 |
| Appendix G | List of Organizations and Individuals Making Oral Presentations at the Professional Organizations Committee's Public Meetings, May and June, 1979 | 287 |
| Appendix H | Text of Letters from The Honourable R. Roy McMurtry, Attorney General for Ontario, to Mr. J.E. Benson, P.Eng., President of the Association of Professional Engineers of Ontario, and Mr. Irving Rayman, MRAIC, President of the Ontario Association of Architects, June 12, 1979 | 290 |

List of Tables

| | | |
|-----------|---|-----|
| Table 6.1 | Membership Data for Accounting Organizations in Ontario, September, 1979 | 129 |
|-----------|---|-----|

Foreword

The opening chapter of this Report conveys to the reader an overall view of our work as a Committee. It outlines the process of research and consultation that we followed, discloses the basic principles that underlie our Report, and indicates the general thrust of our recommendations. A complete summary of these recommendations can be found in Chapter 14. This chapter reproduces *verbatim* the recommendations that appear throughout the text of the Report.

Chapter 2 presents our proposals for revisions in the general structures and processes that pertain to the public accountability of the self-regulating licensing professions. In particular, it attempts to delineate in a general fashion what matters should be prescribed by statute; what should be left to regulations subject to approval by the Lieutenant Governor in Council; and what should be reserved for the exclusive rule-making powers of the professions. This chapter also proposes that there be a Lay Observer for the professions to assist members of the public who are dissatisfied with the manner in which professional bodies have handled complaints against practitioners and to report regularly and publicly on the adequacy of each profession's complaints-handling procedures.

The next five chapters examine issues which arise from the fact that the four professions under review confer exclusive rights to practise upon their members. Chapter 3 examines the licensed practice of law in relation to legal services that are provided by paralegal personnel, community legal workers, and notaries. Chapter 4 deals with the relations between professional and technical personnel in engineering and architecture. Chapter 5 is devoted to the scope of practice dispute between engineers and architects. Chapter 6 discusses the scope of public accounting and assesses the rival claims of the professional accounting organizations.

The following chapters are devoted to cross-professional issues. They cover citizenship and transfer rules (Chapter 7); incorporation of professional practices (Chapter 8); continuing competence (Chapter 9); advertising (Chapter 10); fees (Chapter 11); and employee professionals (Chapter 12).

The final textual chapter, Chapter 13, offers our response to a multiplicity of claims for certification and licensure that were addressed to us in the course of our inquiry. The proponents of these claims were by no means confined to the professional areas of accounting, architecture, engineering, and law. The intensity of their concern for greater professional recognition, however, was such that we concluded that we would be remiss should we fail to respond.

Appendix A to this Report provides background material on the current organization and demographics of the accounting, architectural, engineering, and legal professions in Ontario. The remaining appendices list all the researchers, organizations, committees, and individuals whose outstanding contribution to our work is hereby gratefully acknowledged.

The three members of our Research Directorate, Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, played a central role in our work. We have explicitly documented the magnitude of their contribution in Chapter 1. This contribution infuses our entire Report.

The staff researchers our Directorate supervised, Selma Colvin, Linda Kahn, Donald Milner, J. Marc Sievers, and Janet Yale, discharged their duties with the utmost distinction. Our secretarial staff coped cheerfully and skillfully with draft after draft of working papers, the Research Directorate's Staff Study, and the chapters of this Report. To Phyllis Bartley and Vicki Krangle, we are most grateful.

The contribution of one individual stands out above all the others. We, and for that matter the members of our Research Directorate, were all engaged in the affairs of the Professional Organizations Committee on a part-time basis. Our full-time Administrator, Linda Kahn, was accordingly the nerve-centre of all our operations. Her devotion and skill, to say nothing of the initiative and leadership she displayed as a gentle yet demanding taskmaster, leave us in her debt beyond what the ordinary meaning of words can convey.

H. A. L.
J. A. C.
J. S. D.

Chapter 1 Process, Principles, and Prescriptions

What was the Professional Organizations Committee all about? We came on the scene as a ministerial committee appointed by the Attorney General of Ontario in May of 1977. We were the heirs to a reference he had made a year earlier to the Ontario Law Reform Commission. That reference requested a review of statutes governing the professions of public accounting, architecture, engineering, and law “with a view to making recommendations to the Government for comprehensive legislation setting the legal framework within which these professions are to operate.”

The submission of this Report marks the end of our existence as a Committee. We think it appropriate to convey in this opening chapter the gist of what we were about. We went through a lengthy process of consultation, research, and public meetings. In the course of this process, we developed and fleshed out a set of principles that became central in facing the basic question, “What is to be done?” The detailed recommendations advanced in this Report have a prescriptive thrust that reflects the process we went through and the principles we came to adopt as our own. Accordingly, in summarizing what we were about, this chapter deals with process, principles, and prescriptions.

A. A Somewhat Different Process

There exists a standard process that is frequently followed by commissions or committees such as ours. A research staff is put to work and consultants are engaged to write specific studies. While the research is underway, the commissioners or committee members solicit the views of interested groups and individuals whose briefs are then discussed at public hearings. After the public hearings, the committee receives the studies of its researchers and prepares its report with an eye on the research results and an ear tuned to what it has heard. Finally, the report is released, along with selected research studies that, in the opinion of the committee and its staff, are of sufficient interest and quality to merit publication.

Partly because we deemed it appropriate to an examination of self-governing professions, partly because we were in a frankly experimental mood, we chose to depart from this standard process in a number of respects. Specifically, we encouraged the major groups involved to strike liaison committees and to make submissions which

we discussed privately with them in the summer and fall of 1977.¹ Meantime, the three members of our Research Directorate initiated a series of working papers by outside researchers, together with a programme of surveys, interviews, and data analyses whose results were made available to the researchers.²

The broad terms of reference given to the outside researchers were also communicated to the public, together with an invitation to submit briefs pertaining thereto.³ As the researchers' working papers became available, they were transmitted to the liaison committees. We then engaged with the liaison committees in a further round of private discussions. These discussions, held in the summer and fall of 1978, embraced both the working papers and the briefs. The members of our Research Directorate were involved with us in all these private discussions.

The stage was now set for what we had decided in 1977 should be the main event prior to formal public meetings. At that time, we had asked the three members of our Research Directorate to prepare a comprehensive Staff Study analyzing all the issues before us and advancing their own concrete proposals in the interest of sharpening discussion and focusing debate. The resulting book, *Professional Regulation*, by Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, was published in January, 1979.⁴

It was upon the release of *Professional Regulation*—the Staff Study—that public briefs were solicited⁵ and public meetings scheduled.⁶ After devoting twelve days to these meetings over the period

¹For a list of the organizations which participated in liaison meetings with the Professional Organizations Committee, see Appendix B to this Report.

²For a list of the Professional Organizations Committee's working papers and other publications, see Appendix C to this Report.

³For a list of the organizations and individuals submitting "preliminary" and "intermediate" briefs to the Professional Organizations Committee, see Appendices D and E to this Report, respectively.

⁴Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979). This publication is referred to throughout this Report alternately as simply *Professional Regulation* or the Staff Study.

⁵For a list of the organizations and individuals submitting "final" briefs to the Professional Organizations Committee, see Appendix F to this Report.

⁶For a list of the organizations and individuals making oral presentations to the Professional Organizations Committee, see Appendix G to this Report.

from May 15 to June 29, 1979, we semi-retired to write our Report. We use the term “semi-retired” advisedly, for the public meetings yielded a joint request to the Attorney General from the licensing bodies in architecture and engineering for our assistance in exploring the possibility of a negotiated settlement of the disputed scope of practice in the field of building design. The request was granted, engaging us in yet further consultations. This Report is thus indeed the outcome of a somewhat different process.

Looking back on this process, we are prompted to make a number of observations. Ours was not an inquiry that was unanimously welcomed. As a matter of fact, it is because at the very outset questions arose over the advisability of a body composed entirely of lawyers, many of them practitioners, inquiring into the regulation of their own profession and three others as well, that we were appointed to take the place of the Ontario Law Reform Commission. That the professions were ready to cooperate with us was never in doubt, but from the time of our appointment we were offered more than a few reminders that we were unwanted symbols of yet more potential government interference. The tradition of self-governing professions is strong in Ontario; like other institutions long established in our society, such as municipalities and universities, the professions closely guard their autonomy.

There was thus a mixture of positive and negative attitudes towards our existence. By engaging in private discussions with liaison committees from the outset of our work, we were able to allay the more unreasonable fears, cultivate a helpful attitude to our Research Directorate’s survey and interview programme, and receive frank and at times outspoken opinions on what was considered good and bad about the existing regulatory framework. As the list in Appendix B of this Report indicates, we did anything but limit our liaison to the self-governing professional bodies themselves; our consultative process embraced organizations of employed professionals, technical and support personnel, and other communities of interests, including consumer interests.

The impressions we derived from the variety of viewpoints that our initial private liaison meetings communicated were two-fold. First, there was much evidence that the professions under review were healthy and dynamic, and that they were responsive to both public and self-criticism. Indeed we became aware that from year to year the

stream of self-generated reforms was such that it was difficult to do descriptive justice to prevailing regulatory practices at any given point in time. The professions were certainly adaptable.

Second, however, there were many indications of tension—tension between architects and engineers in the field of building design; tension among associations of the accounting profession over what constitutes public accounting, and who should license it; tension within the legal profession generated by what has been an ongoing explosion in the number of practitioners. There was tension, especially in engineering and architecture, between university-educated licensed professionals and highly trained technical personnel. There was tension as well, notably between law clerks and legal secretaries, among paraprofessionals themselves. There was even tension over whether “paraprofessionals” are properly designated as such or whether they should be regarded instead as professionals or members of allied professions.

The two broad impressions we derived—one of adaptable, healthy, and dynamic professions, the other of tension—were not contradictory. Tension, after all, normally accompanies the movement and flux that are part and parcel of any dynamic setting. Our initial impressions therefore complemented one another, and they were not dispelled in any of the subsequent phases of our process.

When we engaged in the second phase of our private consultations in the summer of 1978, we had the benefit of the drafts of the working papers that had been commissioned by our Research Directorate. This enabled us to test the reliability of the descriptive and quantitative material that these papers contained. In that these papers included their authors’ own prescriptive suggestions, they also helped us to gauge initial reactions to proposals for change. Here again a mixture of adaptability and tension was evident. With respect to the latter, there seemed to be concern in certain liaison meetings over whether we, as a Committee, might have a vested interest in the proposals of the outside researchers such that their prescriptions would simply be confirmed and reconfirmed in each of the remaining steps of our process. No fear could have been more unfounded, as the publication of the Staff Study, *Professional Regulation*, made evident.

The expert authors of this book had intimate knowledge of the working papers that had been prepared under their direction. They

had the benefit of the insights derived from having been party to all the private discussions we had held with the liaison committees. They had been left entirely free to develop their own proposals. These proposals in turn did not necessarily coincide with those that had been made by the authors of the working papers, sixteen of which were published simultaneously with *Professional Regulation* and frequently offered their readers contrasting views.

Because it was now plain that experts could differ over what directions might be pursued in the regulation of the professions, concern that we ourselves might have become the captives of particular views could be laid to rest. More important yet, the groups and individuals who now turned to the preparation of public briefs had a wealth of information and a variety of proposals on which to focus their views. We greatly appreciate the frank and detailed nature of the submissions we received and hope that the transcript of the public meetings testifies that we asked questions which reciprocated in kind.

The contribution of the Staff Study to our public meetings and subsequent deliberations is worth elaborating. In some instances, the analysis presented in the Staff Study, backed by working papers, sustained the validity of certain broad approaches to regulation. Discussion could accordingly focus on how such approaches might most appropriately be followed. Thus, for instance, the Staff Study confirmed the validity of professional self-government in public accounting, architecture, engineering, and law. This permitted exploration in depth of how these professions might be held accountable to the public and how their accountability could best be reconciled with the essentials of self-government.

In other instances, particular proposals advanced in the Staff Study attracted the approbation of certain groups and the disapproval of others. This was the case, for example, with respect to the presence of paraprofessionals on professional governing bodies and their committees. With their attention thus focused, both the supporters and the opponents of this proposal helped to clarify whether the bone of contention was indeed the presence of paraprofessionals generally, or their involvement in particular kinds of peer judgement committees.

There were yet other instances where proposals made in the Staff Study fell on completely barren ground, and in so doing told us

eloquently that our priorities as a Committee could safely lie elsewhere. Thus, a proposed scheme for the governmental regulation of notaries public received no attention whatever from the legal profession, paralegals, or the public. Indeed, no person holding a notarial commission in Ontario came forward at the public meetings.

In certain particularly delicate matters, the Staff Study served the purpose of broadcasting the elements of what might become imposed solutions. A telling case in point was the proposal that there be a specialty designated as "Licensed Building Engineers." This proposal prompted redoubled efforts by the engineers and architects to iron out their differences in a manner that might be viewed as consistent with the public interest.

Finally, the simple appearance of the Staff Study as a major public document in the field of professional regulation made evident the seriousness of our inquiry and stimulated wide participation in our public meetings. Individuals often came forward because the publicity generated by the appearance of the Staff Study informed them of our existence and encouraged them to state their views. Also, and well beyond the confines of the four professions under review, the Staff Study was seen as heralding the possibility that something of consequence might be afoot for the regulation of professions and occupations generally. At the outset of our process, we had been made aware that a number of professional and occupational groups not currently under review nonetheless had an interest in our work. The Staff Study stimulated an unexpected leap in the number of these groups. This affected the final preparation of our Report, for we came to appreciate that the current environment is such that regulatory policy towards any particular set of professions should not be blind to the aspirations of other occupations.

So much for the somewhat different process we followed as a Committee. We return to the validity of the impressions we derived at an early stage in this process, namely that the professions under review are healthy and dynamic and, at the same time, exhibit tensions. In this kind of environment, a principled approach to prescriptions is particularly important. Throughout the process of our inquiry, we constantly tried to ask ourselves what the scope of our own principles might be. Let us now address this matter.

B. A Set of Principles

For the principles that emerged from our deliberations, we owe an enormous intellectual debt to the three members of our Research Directorate. They identified in their Staff Study four principles to guide the formation of regulatory policy vis à vis the professions: The Protection of Vulnerable Interests; Fairness of Regulation; Feasibility of Implementation; and Public Accountability of Regulatory Bodies. We came to adopt these four principles as the ones that should underlie this Report.

To adopt a set of principles entails more than an exercise in identification. It is a quest for content, balance, and relevance that requires many personal judgements. The extent to which this is so became clearly, sometimes painfully, apparent as our quest proceeded, forcing us to grapple with fundamental questions. With respect to content, we were asking what we believed our principles stood for. As for balance, we were prodding the extent to which any given principle could or should be satisfied in deference to the others. And as to relevance, we were not dealing in bloodless abstractions, but in working principles applicable to very real professions existing in the complex society that is contemporary Ontario.

For the result of our quest, we alone are responsible. Our prejudices will doubtless be apparent; our debts should be acknowledged. They extend to the authors of all the working papers initiated by our Research Directorate. These researchers contributed as much to our thinking when they advanced views that we found questionable as when they put forward views that gave us comfort. As they proceeded to educate us, what views fell in which category shifted several times. We are also indebted to all who communicated with us, in public and private. It is from the representatives of professional organizations, from individual members of the professions and of allied occupations, and from members of the public that we gained a sense of who we were developing principles for. Finally, we are indebted a second time over to the members of our Research Directorate, whose support remained invaluable as we fleshed out the considerations that follow.

B.1 The Protection of Vulnerable Interests

The provision of professional services involves three broad

categories of interests, all of which are potentially vulnerable. There are *first party interests*, which are those of the providers of professional services—not only professionals themselves, but all who are allied with them in what has become increasingly a team effort. Then there are *second party interests*, which are those of the clients for professional services. Finally, there are *third party interests*, those of the general public who have neither provided nor purchased professional services but are liable to be affected by the result.

All four professions with which we are involved affect third party interests. Consider, for example, the stake of members of the public in reliable information on which to base investment decisions; in safe and aesthetic buildings; in a system of criminal justice that is fair and effective. This stake justifies the regulation of each of the accounting, architectural, engineering, and legal professions. Third party interests—or, if you will, the interests of innocent bystanders—are potentially vulnerable in each instance.

Among the four professions, the vulnerability of second party interests is more variable. The more a client is knowledgeable and experienced, the less he is in need of the protection that regulation affords. The sophisticated client can discriminate among the providers of professional services and can gauge their competence for performing the task at hand.

Purchasers of engineering services are normally experienced and frequently enjoy the benefit of in-house professional advice. The same is true of the larger purchasers of architectural services, although the clientele of this profession is also drawn in part from the so-called “household sector”; that is, from generally inexperienced members of the public who may wish to obtain a house designed to their individual tastes. In public accounting, large enterprises engage auditing firms from a background of considerable sophistication in the use of accounting services of all kinds. Furthermore, even the small businessman has free access to the advice of banking and other lending institutions, many of whose officials may be fairly knowledgeable of the range of auditing services that will suit particular needs. In law, business clients exhibit degrees of sophistication similar to those that prevail in the marketplace for accounting services.

Where the legal profession differs from all the others is in the extent to which a substantial proportion of its clientele is drawn from

the less affluent and more uninformed members of the household sector who will develop only occasional but nonetheless pressing needs for legal services in connection with matters like a real estate transaction, a divorce, a civil suit, or a criminal charge. As a general proposition, the vulnerability of second party interests is greatest in law, substantially less in architecture and accounting, and least in engineering.

The vulnerability of second and third party interests is often deemed to constitute the entire case for professional regulation. We consider it essential that this case take account of first party interests as well. The interests of the providers of professional services encompass not only those of the members of the learned professions themselves, but also those of the members of allied and supporting occupations who join the more narrowly defined professionals in a service team. Engineering and architectural services are particularly likely to be the outcome of a team approach in which professional and technical personnel have both played an indispensable role. The contribution of law clerks and legal secretaries to the practice of law is anything but negligible. There is a case for regulation to promote smooth relations among the members of the professional team whose interests are potentially vulnerable to exploitation or to ill-defined lines of responsibility.

Equally significant, and of general applicability to all four professions, is the extent to which first party interests require protection if professionalism in the best sense of the term is to prevail. In the words of Professor Michael Spence, “the society has a long-term interest in attracting high quality people to the professions, especially to the segments where quality is imperfectly perceived by consumers.”⁷ Quality is always a vulnerable commodity and becomes the ground where the desirability of protecting first, second, and third party interests coincides.

The principle of the protection of vulnerable interests speaks in favour of professional regulation. Viewed in context, it is also relevant to two important questions— how to regulate and how much. With respect to the “how” of regulation, the principle does much to uphold

⁷Michael Spence, *Entry, Conduct and Regulation in Professional Markets*, Working Paper #2 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), p. 16.

the validity of self-regulation. The provision of professional services involves in all instances the application of knowledge that can only be acquired by long and arduous training. This knowledge is applied by its holders to the almost infinitely varied circumstances of individual clients. The professional-client relationship is one that above all must be based on mutual trust. As the Staff Study expresses it, “professionals must be trusted to act for their clients rather than for themselves, and they must be trusted to be sensitive to the interests of affected third parties.”⁸

In theory, the state could always choose to regulate professional services directly. But it would have to hire experts to assist it in the task. These experts would themselves have to be professionals to possess the requisite knowledge of the services being regulated. The costs of replicating within government knowledge that exists within professions are not negligible. It is less costly to place the responsibility for regulation in the hands of the professions themselves. Most important, the vesting of this responsibility in the professions mirrors and reinforces the trust relationship that must exist between professionals and their clients.

As for “how much” to regulate, this question must be posed at two distinct levels. At the first level, what is at stake is the extent to which self-regulating professions should themselves be regulated by government. Here the principle of public accountability enters into play and the matter will accordingly be considered later in this chapter.

The second level at which the question of how much to regulate arises, involves individual professionals vis à vis the self-regulating professions to which they belong. The principle of the protection of vulnerable interests justifies regulation. But it can be subverted if self-governing professions interpret their mandate as a sweeping licence to regulate every aspect of the behaviour of their individual members. Second party or client interests can be vulnerable to regulations which, for instance, by prohibiting all forms of advertising, deny access to knowledge from which to make an informed choice of a particular professional.

⁸Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 4, p. 83.

To take another example, regulations that place severe strictures on the extent to which a professional can practise jointly with a member of another profession can add to the cost of procuring an integrated package of professional services. Third party interests may suffer to the extent that the cost to clients of excessive regulation is passed on to the public in higher prices. Meanwhile, the first party interests of individual professionals can suffer if over-regulation inhibits their initiative in organizing their practices and deploying their services. Nor is the vulnerability of first party interests fully covered by the point that self-governing professions can only generate regulations with the approval of the membership, for this raises the further question of majority rule and minority rights.

We conclude that if the principle of the protection of vulnerable interests speaks for the regulation of professionals, it also speaks against the over-regulation of professionals. To the extent that so-called market forces come into play in the absence of regulation, they have their own positive role to play in ensuring that vulnerable interests will be protected.

B.2 Fairness of Regulation

As a principle, fairness of regulation appears to be a self-evident proposition. It closely complements the principle of protection of vulnerable interests, being particularly relevant to first and second party interests. We elaborate on fairness of regulation in this light.

With respect to first party interests, fairness of regulation must be viewed in the context of two sets of interests, namely those of the existing providers of professional services and those of aspiring professionals. Particularly in regard to the regulation of entry into a *licensed* profession, that is, a profession whose practice is the exclusive preserve of its accredited members, these interests may diverge. Arbitrary quotas that seek to limit the number of persons who will be admitted to professional practice from year to year, so as to increase the scarcity of professional services and hence raise the incomes of existing service providers, are inherently unfair to aspiring professionals. They are also unfair to second party interests because they inflate client costs.

The principle of fairness of regulation stands in opposition to arbitrary quotas or any other devices that seek to impose barriers to

entry into a licensed profession for the economic benefit of its members. We are pleased to report that our inquiry revealed no evidence that such barriers have been erected in any of the four professions under review. In this regard, the professions of accounting, architecture, engineering, and law in Ontario can be deemed to be open professions, and the principle of fairness of regulation is met.

There is another facet of the fairness principle that touches specifically on the interests of aspiring professionals. This group subdivides into those individuals who seek entry to a particular profession through the normal route of prescribed academic and practical studies, and those who, from a background of working experience as paraprofessionals or as members of an allied profession, wish to qualify for membership in the profession. Fairness of regulation calls for a situation where the studies prescribed as the normal route of entry into a profession will be clearly outlined and widely disseminated. Subject choices made by students even in the early years of secondary school need to be enlightened by information on the requirements for professional entry. As for individuals who wish to qualify for a profession after a number of years of relevant working experience, fairness calls for bridging provisions that are widely publicized and for academic opportunities that are accessible.

Fairness also requires that bridging provisions take reasonable account of relevant experience in fulfillment of practical training requirements. Such provisions should also make academic demands that are neither excessively onerous nor, in deference to the interests of applicants who follow the normal route of preparation, less difficult than those prescribed for them. Of final importance, common to all aspiring entrants, the principle of fairness of regulation speaks for a measure of stability in the "rules of the game." Aspiring entrants must make large investments in education and training. These investment decisions should be made with confidence that admission rules will not change in midstream. When changes do occur, fairness calls for appropriate "grandfathering" provisions.

The principle of fairness of regulation has procedural connotations of critical relevance to the interests of existing providers of professional services and also to those of applicants for entry into the profession from other jurisdictions or by other special circumstance. Disciplinary and all other proceedings that lead to decisions affecting the livelihood of professionals should be impartial and in

accordance with due process of law. The professions should be authorized to impose a wide variety of sanctions so as to ensure that "the punishment will fit the crime."

Although we have dwelt at some length on the importance of fairness of regulation for the protection of first party interests, we are no less conscious of the extent to which this principle is vital to the protection of second party interests. Clients who harbour complaints about the professional services they have received should have appropriate avenues of redress. Civil liability suits are an important avenue in this regard, and one that is increasingly available to third parties as well as clients. Fairness demands that the confusion which currently exists in Ontario with respect to the application of limitation periods to civil liability suits for professional negligence be removed.

Fairness of regulation also has major implications for complaints procedures. The availability and the nature of these procedures should be widely publicized. Equally important, complainants should be handled with the greatest courtesy, and every reasonable effort should be made to ensure that no complainant has grounds on which to suspect that a grievance has been handled in a defensive manner. Ombudsmen, lay observers, and assorted agencies constitute means of helping to ensure that grievances against professionals will be handled in a manner that is of the utmost fairness to the complainant. We have devoted much thought to the methods whereby complaint procedures in the four professions under review can be made to fulfill the principle of fairness of regulation.

B.3 Feasibility of Implementation

As a sage once put it, "no mousetrap is better if it fails to catch mice." As a Committee charged with the task of making recommendations on the legal framework within which the four professions under review are to operate in Ontario, we were not presented with a blank slate. In each of these professional areas, regulatory systems are currently in place. Relationships have been established within these systems, and the implementation of change may be complicated by the need for participants not just to learn new rules, but to "unlearn" old ones. Also, organized interests, notably but far from exclusively, professional interests, have arisen and multiplied within and around existing regulatory systems. Any policy direction which fails to take

account of these realities—however defensible may be the balance of interests the direction serves, however attractive it may be in terms of what it covers by regulation and what it leaves to the choices of the market, and however fair its ground rules—may well founder because of organized resistance.

The importance we attach to the principle of feasibility of implementation is reflected in the process we chose to follow as a Committee. Private consultations, the sharing of our research results with affected groups and with the public, the release of a major Staff Study—all of these prior to a major set of public meetings—the whole was designed to give us the clearest possible impression not only of what might be desirable, but of what might be feasible. Our respect for the same principle explains why, after the public meetings and even as we were writing this Report, we were willing to become engaged in exploring with the licensing bodies in architecture and engineering the possibility of a negotiated settlement of the disputed scope of practice in the field of building design. We were of course conscious that we must not permit ourselves to endorse a settlement that would be injurious to broader public interests. At the same time, however, we realized that even an imposed settlement would be more likely to be workable if the two professions had been given every opportunity to come to terms.

Feasibility of implementation has guided much of our thinking in the preparation of this Report, and we believe that this principle is equally valid in the consideration of any alternatives that might be advanced to the recommendations we have made. A policy must “work” as intended. One must be able to put it into effect, and one must be able to change it if its results are not as intended. It is in the interests of both government and the professions that there be adequate information flows in the form of annual reports. In addition, those who are charged with administering a policy must know what to do to achieve its goal and must be motivated to do it. In that self-regulating professions are involved, motivation must not be sapped by excessive government interference. Both government and the professions must be willing to learn from experience with a policy. Periodic reviews of the professions can be important symbols of this willingness, but they must not take place so frequently as to be either cumbersome or destabilizing.

Above all, the principle of feasibility of implementation wisely dictates that policy choices should be infused with a sense of priority in the expenditure of regulatory resources. Whether regulation is by government or a profession, it demands expenditures in people and in time. Successive layers of professional and governmental bureaucracy are inherently wasteful. So are statutes, regulations, and directives that attempt to prescribe at the level of detailed minutiae. Bureaucracies that are left to conduct a form of naval warfare in a sea of paperwork are worse than counterproductive; they sooner or later can drain the energies of those involved to the point where the individuals, who by reason of their experience, knowledge, and status have most to contribute to professional regulation, will either retire from the scene or refuse to enter it.

Feasibility of implementation accordingly calls for a sense of priority in identifying any problems that require remedy. It also speaks eloquently for a regulatory framework in which all the principal actors, be they the Legislature, Cabinet, public servants, professional governing bodies, or committees, will retain ample scope within which to act flexibly and with a sense of their own responsibility.

B.4 Public Accountability of Regulatory Bodies

A self-regulating profession or occupation can be of two kinds. It may be a *certifying* body, in which case it has the right to confer a designation called a reserved title, which by law cannot be used by an unauthorized person. Certification is an important signal to members of the public that an individual offering services to clients or to employers has achieved a stipulated level of training and practical experience. But it does not prevent uncertified individuals from offering similar services.

Quite distinct from a certifying body, a self-regulating profession can be a *licensing* body, in which case an unauthorized person is prevented by law not only from using the given designation, but from offering the licensed services. In each instance, a right has been conferred on a self-regulating profession by the Legislature. In the case of the licensing body, this right is particularly valuable in economic terms.

Given a setting where the Legislature has bestowed valuable rights on professional regulatory bodies, the principle of public accountability acquires great importance. It is a fundamental principle of our political system that those who make policy decisions ought to be held accountable to those who are affected by their decisions. In operational terms, the principle of public accountability must be honoured at three levels: as between a professional governing council and the members of the profession; as between a professional governing council and the government, both Cabinet and Legislature; and as between Cabinet and the Legislature.

It is especially appropriate to expound upon the principle of public accountability in the context of licensing bodies, which by statute confer the most valuable rights on their membership. This principle calls for statutory recognition of the licensing body, and for statutory provisions outlining the relationship that shall exist between the licensing body and its membership. In particular, members who disagree with the decisions of the licensing body must have apparent and available avenues to seek redress. So as not to overburden the legislative process, the principle of accountability indicates that the regulations promulgated by a licensing body should be subject to Lieutenant Governor in Council approval, thereby retaining a link to the Legislature to which Cabinet is itself responsible. As a further means of ensuring that licensing bodies will be responsive to broad public interests, accountability invites the stipulation that the Lieutenant Governor in Council has the authority to appoint a certain number of individuals to the governing council of the licensing body.

Where a regulatory body confers certification as distinct from licensure, some of the above requirements can appropriately be relaxed. We refer in particular to the need for individual statutes, for Cabinet approval of regulations, and for Lieutenant Governor in Council appointees to the governing council. The four professions with which we are immediately concerned all operate under licensure regimes, but certification enters into the picture in that it is of major interest to paraprofessionals and members of allied occupations.

The principle of public accountability invites provisions such as the ones we have outlined above because the Legislature has conferred rights on professional regulatory bodies, rights whose exercise vitally affects broader public interests. But it is of the utmost

importance to remember that this principle derives its operational significance precisely because the Legislature has conferred such rights upon professions *whom it intends should be self-regulating*.

Public accountability must accordingly be viewed in a context where what exists are self-regulating professions with a sphere of autonomy that has been explicitly sanctioned by the Legislature. Public accountability must respect this autonomous sphere lest there remain nothing to be accountable for. It must also be applied with a due sense of priority in the expenditure of regulatory resources lest it founder on the shoals of implementation. But applied it must be. Our first two principles—the protection of vulnerable interests and fairness of regulation—stand or fall on the extent to which public accountability is honoured.

C. Prescriptions for Ontario

We have made 81 specific recommendations, all of which are conveniently assembled in Chapter 14. Given our mandate, many of these recommendations entail legislative change. Some provide advice, occasionally on a contingency basis, to the Lieutenant Governor in Council or the Attorney General. Yet others, given our respect for professional self-government, are addressed to the professional bodies themselves.

Our recommendations have a prescriptive thrust that is closely tied to the principles we espouse. With respect to the structures and processes of professional self-government, our recommendations seek lean professional statutes that will establish the powers and composition of each governing body, stipulate the essential committee structure, and ensure that proper avenues of appeal will be available. We believe that the regulatory environment should respect the need to economize on the burdens that must be carried by the legislative process. Accordingly, the professions should not be forced to request legislative amendments in order to secure from time to time structural changes that are of no consequence to interests other than their own interest in efficient self-government.

Professional self-government involves decision-making on a wide range of matters that are inherently in the realm of public policy. The Legislature, which has conferred particularly valuable rights on

the licensed professions and whose wise intent is that these professions should be self-governing, is entitled to an account of how the powers of the professions are being exercised. We therefore prescribe that annual reports from each of the professions be tabled in the Legislature. Under our form of responsible cabinet government, the other important route to accountability lies through the Lieutenant Governor in Council.

At present, all regulations of the Association of Professional Engineers of Ontario and of the Law Society of Upper Canada must be approved by the Lieutenant Governor in Council before promulgation. In practice, approval follows a review of the proposed regulations by the Minister responsible. We propose that ministerial review and Lieutenant Governor in Council approval be required by law with respect to the regulations of all four licensed professions. We have also endeavoured to delineate as carefully as possible what subjects, given their public policy implications, should be deemed to require regulation, and what subjects need not occupy the time of the Lieutenant Governor in Council.

Lay representation on the governing bodies of the engineering and legal professions has existed for some years; we recommend that it be extended to the accounting and architectural professions, and that in all instances, the Lieutenant Governor in Council approach the appointment of lay members with a view to achieving, over time, a judicious representation of allied professional, paraprofessional, client, and general interests. Lay representation is one, but by no means the only, mechanism that we favour to help ensure that public confidence in the professions that serve them will be equal to the confidence that the professions justly deserve.

Fees can be a source of needless tension in professional-client relations. We prescribe that all professions consider adopting rules of professional conduct requiring disclosure to clients of the basis on which fees will be determined and requiring a professional to notify a client of the availability of fees mediation or review procedures in cases where he or she is unable to resolve a fees complaint to the client's satisfaction.

Client complaints can involve any aspect of a professional's conduct. In the real world, some complaints will be legitimate and others illegitimate; some will be incoherent and others obsessive.

Professional careers are exposed on a day-to-day basis because professionals deal with the public on a day-to-day basis. Professional bodies bear a heavy responsibility not only to the public, but to their members for ensuring that complaints are not only handled fairly, but in a manner that will project a positive public image of the profession. As we have already pointed out, we devoted much thought to how the professions might be assisted in this regard. We have concluded that there should be created in Ontario a Lay Observer for the professions of accounting, architecture, engineering, and law.

In the course of our inquiry, we became most impressed by what appears in Ontario to be a strong public perception that professional governing bodies, however well structured their internal procedures may be, ought not to be able unilaterally to dispose of complaints. In the health professions, this perception was instrumental to the creation of the Health Disciplines Board. It would be inequitable, and could reflect unfavourably on the image of the professions here reviewed, were there to be no mechanism for the external review of complaints addressed to them. We prescribe a single Lay Observer for all four of these professions as an economical and efficient review mechanism.

In a number of respects, we find that the statutes which constitute the governing bodies of the professions unduly restrict the powers of these bodies to ensure the continuing competence of their members. We therefore prescribe that these bodies be given broad powers to conduct practice inspections. We also recommend that they be empowered to impose a wide range of sanctions on professionals found guilty of disciplinary offences, this range to include fines, supervised practice, and compulsory continuing education. In prescribing that the professional governing bodies should be endowed with these greater degrees of flexibility, we urge these bodies to assign priority to regulatory efforts designed to enhance the competence of their members.

On the other hand, we are concerned about the extent to which current statutes, regulations, and practices over-regulate the members of the professions in several areas. Accordingly, we recommend that statutory provisions prohibiting collective bargaining by these professionals should be removed. We also prescribe that professionals who wish to do so be permitted to incorporate their practices subject to provisions that will leave their fiduciary, confidential, and ethical

relationships with clients unaffected. Finally, and of particular relevance to members of the legal profession, we recommend a more permissive approach to advertising. In particular, we urge the Law Society to bring forward revised Rules of Professional Conduct to permit members to advertise in the print media such information as languages spoken, preferred areas of practice, representative clients, publications, and fees charged for initial consultations, hourly rates, or fixed fees for services.

In an area that is of specific concern to professional engineers and technical personnel, we have sought to clarify the relations that exist among the members of the engineering team. In particular, we recommend that the definition of the practice of professional engineering should emphasize that what is involved is the taking of professional responsibility for engineering work. The performance of engineering tasks should not in itself be confused with the practice of professional engineering, and the realities of the important role played by technical personnel as members of the engineering team should no longer be clouded by the statutory definition of professional engineering.

Another area of specific concern is, of course, the matter of the scope of practice dispute between engineers and architects. We are pleased to state that the negotiations conducted with the assistance of our good offices, even as this Report was being written, produced an agreement which we wholeheartedly endorse as being in the public interest. This agreement formulates the basic principle that engineers should do engineering and architects, architecture and goes on to stipulate that this condition will be met in practice through the *employment* of the relevant professional by either an architectural, an engineering, or a mixed firm.

It is upon this employment feature that our fundamental support of the agreement is based. The agreement obviates the hitherto dismal prospect of continued efforts on the part of engineering firms and architectural firms to carve up, by legal means, the market for design services in Ontario. Such a prospect flew in the face of the reality of technological interdependence and of the desirability of client choice. The agreement ensures that a firm, even if owned entirely by architects or by engineers, will be legally able to compete in the entire market for design services provided it employs members of the appropriate profession. The agreement thereby enhances the potential for

competition in the building design field and, in so doing, provides powerful insurance against the danger of professional featherbedding. In this competitive context, the incentive of any firm will be to provide the appropriate *mix* of professionals rather than add unnecessarily to numbers.

The final profession-specific area for which we prescribe involves the contentious matter of what should be the scope of the licence in public accounting, and who should license it. We recommend that the scope of the licence in public accounting should encompass both audits and what have come to be known as non-audit reviews. Whenever individuals practising outside the scope of the public accounting licence associate themselves with financial information, they should sign a disclaimer whose format has been prescribed by law.

As to who should issue licences in public accounting, we deem it most advisable that the accounting profession should approximate to the highest possible degree the model of a self-governing profession. We have accordingly prescribed that the existing Public Accountants Council should be abolished, and that the Certified General Accountants Association of Ontario (CGAAO), the Institute of Chartered Accountants of Ontario (ICAO), and the Society of Management Accountants of Ontario (SMAO) should all acquire the right to issue licences in public accounting to those of their members who qualify.

For the protection of the public, we recommend that the governing statutes of each of these organizations should stipulate that failure to adhere to the Handbook of the Canadian Institute of Chartered Accountants shall constitute *prima facie* evidence of professional incompetence for purposes of disciplinary sanctions, and that such failure shall be taken by the courts as *prima facie* evidence of negligence in civil liability suits. We also recommend that none of the three organizations should be permitted to issue a public accounting licence unless the candidate for licensure has passed a common licensing examination to be administered by a new agency, the Public Accounting Licensing Admission Board. We ask that negotiations be undertaken between the Board and the ICAO with a view to making the national Uniform Final Examination currently used by the ICAO available to the Board as the common licensing examination for Ontario.

Certification, as distinct from licensure, plays an important role in professional regulation. While the reserved titles issued by certifying bodies do not restrict the right of any individual to practise an occupation, they provide quality signals that enhance the protection of the public. Reserved titles figure prominently in the aspirations of several groups which were of central concern to us, namely architectural technologists, engineering technologists, law clerks, and legal secretaries. We also discovered that these titles figure prominently in the aspirations of a large number of other groups whose occupational orientation lies well beyond our terms of reference.

Our terms of reference notwithstanding, the number and intensity of the submissions made to us by organizations seeking to receive or protect reserved title status led us to the conclusion that we would be remiss if we failed to advance a general prescription. We have accordingly recommended that there be enacted an omnibus certification statute to be called "The Professional Designations Act" which would permit the statutory registration of reserved titles through a Registrar. This would facilitate the task of the Government of Ontario in assessing the merits of what we can testify is a lengthy queue of claimants to reserved titles. More centrally related to our terms of reference, this legislation should prove to be most helpful to the organizations of architectural technologists, engineering technologists, law clerks, and legal secretaries whose spokesmen played a full and constructive role in our inquiry.

Claims for reserved titles are one thing. Claims for licensure are another. We are aware of the existence of several claims for exclusive rights to practise in occupations not far removed from the four professions we have examined. To grant licensure claims is to grant to individuals valuable economic rights. It is also to court potential jurisdictional disputes with professions that are already licensed. We believe that no claim to licensure should be granted unless the proponents have established beyond reasonable doubt that their claim is in the public interest, and that it will not give rise to costly legal disputes or endless recourse to the legislative process. We have therefore recommended that no profession should be licensed in Ontario unless the merits of its claim have been thoroughly and publicly reviewed by a special committee of inquiry appointed for the purpose by Order-in-Council.

Thus have we prescribed for Ontario. The professions under review are beyond question healthy, adaptable, and responsive both to their members and to the public. They also labour under a variety of tensions. Our most earnest hope is that our suggestions will improve the regulatory environment in which the professions, the members of their allied occupations, and their students—over 250,000 individuals all told—render their invaluable services to the people of this province. But in our complex and dynamic society, there is no such thing as a once-and-for-all solution. Therefore, we have also recommended that the statutes governing each of the four professions whose regulation we have been privileged to examine should be reviewed every ten years.

Chapter 2 The Structures and Processes of Professional Self-Government

A. Introduction

A.1 The Balance of Public and Professional Authority

In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.

On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of those bodies. Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice. In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable.

A.2 The Case of the Legal Profession

The need to strike a balance between public and professional authority exists in all of the four professions under review; but the case has been made to us that the balance must be weighted towards greater professional autonomy in the case of the legal profession.

The Law Society of Upper Canada, the Ontario Branch of the Canadian Bar Association, the Advocates' Society, and others emphasized to us in briefs and presentations the importance of ensuring that none of our recommendations should undermine the

independence of the legal profession. Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence in its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

We have been impressed by the force and importance of these concerns and have been alert throughout this Report to the need to avoid compromising the critically important values that they reflect. However, we are compelled to acknowledge an inevitable, and in many ways healthy tension between two equally fundamental constitutional values: the independence of the judiciary and the bar, and the supremacy of the legislature. Obviously, neither value can be interpreted or applied in such absolutist terms as to negate the other. The self-governing status of the legal profession must be respected. But as in the case of the other professions, the Ontario Legislature (and its electors), as the source of the statute under which the Law Society derives its regulatory powers, must be entitled to some form of periodic accounting as to how those powers have been, or are being, exercised. Unless government carries out its own responsibilities in this regard, the legal profession becomes a private government exercising public authority over the affairs of large sectors of the public to whom it is in no way accountable.¹

A.3 Recent Currents of Change

In the last fifteen years, both governments and the professions themselves have become increasingly aware of the important role played by professional bodies in the formulation and execution of public policy. Recent changes in the structures and processes whereby the professions are governed in Ontario, as in other jurisdictions, have reflected this growing awareness.

¹A recent Australian inquiry into the legal profession has also addressed the issue of the "independence of the bar" as it relates to professional regulation and similarly expressed the view that such independence cannot be taken to mean total freedom from control and accountability. What must be ensured is that an individual lawyer remains free to give his client proper professional advice and is not penalized for taking up an unpopular cause. New South Wales, Law Reform Commission, *General Regulation*, The Legal Profession Discussion Paper No. 1 (Sydney: Law Reform Commission, 1979), pp. 124-125.

The appropriateness of "lay representation" on professional governing bodies, for example, has been generally accepted in this province. The concept was first put forth in Ontario by the McRuer Royal Commission Inquiry into Civil Rights,² endorsed by the Committee on the Healing Arts,³ and incorporated in *The Health Disciplines Act*.⁴ Of the four professions under review by this Committee, some form of lay representation is a fact in the governing bodies for law and engineering, and has been proposed in architecture and accounting.⁵

In a similar vein, both governments and professional bodies have shown increasing concern with the civil rights of individuals, whether professionals or non-professionals, in their dealings with committees and tribunals of professional bodies. This concern was a major theme of the McRuer Report, and is reflected both in *The Statutory Powers Procedure Act*⁶ of 1971, and in the health disciplines legislation which came into force in 1975. Related to this issue is the general public demand that the complaints procedures of professional bodies not be arbitrary. In the health field, this concern has led to the establishment of the Health Disciplines Board; in the professions under review, and particularly in the legal field, it has been the subject of considerable media attention and was strongly expressed to us in our public meetings.⁷

Finally, the recognition of the important role of professional bodies in public policy is reflected in the adoption of requirements that regulations made under professional statutes require governmental approval before coming into force. At present, all regulations made under *The Professional Engineers Act* and *The Law Society Act*, and "disciplinary" regulations made under *The Architects Act*, require Lieutenant Governor in Council approval before coming into force.⁸ Regulations under *The Public Accountancy Act* require no such approval, although they may be annulled by the Lieutenant

²Ontario, Royal Commission Inquiry into Civil Rights, *Report*, No. 1, Vol. 3 (Toronto: Queen's Printer, 1968), pp. 1,166 and 1,209.

³Ontario, Committee on the Healing Arts, *Report*, Vol. 3 (Toronto: Queen's Printer, 1970), p. 63.

⁴S.O. 1974, c. 47.

⁵See below.

⁶S.O. 1971, c. 47.

⁷See below.

⁸See below.

Governor in Council. Under *The Health Disciplines Act*, the Lieutenant Governor in Council must approve all regulations proposed by professional bodies and may also itself pass regulations in the absence of action by a professional body.

The increasing appreciation of the public role of professional regulatory bodies, then, has been the source of three currents of change: lay representation on governing councils; guarantees of the procedural rights of individuals in their dealings with professional governing bodies; and Lieutenant Governor in Council involvement in the making of professional regulations. Existing legislation in the four professions under review reflects these currents to different degrees (in part because proposed amendments incorporating relevant provisions in architecture and accounting have been deferred pending the conclusion of this Committee's work). Our inquiry therefore provides an opportunity to address the appropriateness of structural and procedural changes in the bodies governing accounting, architecture, engineering, and law.

In so doing, we shall keep in mind the principles which have been set to guide us throughout this Report: the protection of vulnerable interests; fairness; feasibility; and public accountability. The need to protect all interests affected by professional policies—clients, third parties, paraprofessionals, as well as professionals themselves—suggests that such interests must be considered in shaping those policies. By the same token, we cannot neglect the special interests of the individual professionals and non-professionals who will be called upon to serve on professional bodies and to devote much of their time and talent to such activities. Structures and procedures must not be so elaborate or complex as to place an undue burden on these men and women.

“Fairness” implies not only that the formal procedures of professional tribunals should observe principles of due process, but also that the treatment of individuals by staff and members of professional bodies should not be arbitrary. Considerations of “feasibility” require that the structures and processes of professional bodies be flexible enough to permit learning from experience with their operation; and that they be designed with due regard for the constraints imposed by available financial and human resources. Finally, “public accountability” requires that information regarding the activities of professional bodies be publicly available, and that governmental

authorities assume the ultimate responsibility for any promulgation of a professional body which involves a matter of public policy.

With this background in mind, let us consider in more detail the status of the four professions under review with respect to the three general structural and procedural issues outlined above: lay representation; individual rights; and the exercise of regulatory power. In each area, we shall review the existing state of affairs, including recent and proposed changes, and suggest where the currents of change affecting professions generally might be pursued, modified, or consolidated in those particular professions.

B. Lay Representation

It is generally agreed that lay representation on professional governing bodies in some form is appropriate in each of the professions under review. The Association of Professional Engineers of Ontario (APEO) sought and obtained an amendment to *The Professional Engineers Act* in 1969 to permit the Lieutenant Governor in Council to appoint up to two lay members (one of whom shall be a lawyer) to the APEO Council.⁹ These provisions are only permissive, however, and the first appointments were not made until 1975. The Law Society of Upper Canada sought and obtained an amendment to *The Law Society Act* in 1973 to require the Lieutenant Governor in Council to appoint four lay Benchers (members of the governing council of the Law Society), and the first such appointments were made in 1974.¹⁰ The Ontario Association of Architects (OAA) has proposed that *The Architects Act* be amended to include provisions similar to those in *The Professional Engineers Act*. Revisions to *The Public Accountancy Act* proposed by the Public Accountants Council include provisions for the Lieutenant Governor in Council appointment of two Council members who need not be licensed under the Act.¹¹

The Staff Study advocated that the Lieutenant Governor in Council appoint non-professionals to professional governing bodies, and that it draw such appointees from specific communities of interest,

⁹R.S.O. 1970, c. 366, s. 4(6).

¹⁰R.S.O. 1970, c. 238, s. 23(a), as am., S.O. 1973, c. 49, s. 1.

¹¹Public Accountants Council, Brief to the Professional Organizations Committee, April, 1979, Appendix B, p. 2.

such as clients, employers, and paraprofessionals. We take the point that such appointments might help to clarify the somewhat ill-defined role of "lay" representatives on professional governing bodies. Such representatives could speak from their experience of the effects of professional policies, and from the viewpoint of those with a definite stake in the issues at hand. Nevertheless, we are mindful of the reservations expressed to us in briefs and public meetings regarding the Staff Study proposals in this regard. While unanimous in supporting the principle of lay representation, some professional organizations urged that flexibility in the appointment process be maintained, and that no specific constituencies of non-professional representation be statutorily prescribed.¹² On balance, we concur in this view.

In this connection, it should be noted that *The Professional Engineers Act* currently constrains the Lieutenant Governor in Council in the selection of non-professional representatives by providing for the appointment of "one barrister and solicitor of at least ten years standing" as well as one person who is not a member of the APEO. Furthermore, *The Law Society Act* provides that, in addition to four lay Benchers appointed by the Lieutenant Governor in Council, the Attorney General himself shall be an *ex officio* Bencher, and the only *ex officio* Bencher with voting privileges. We share the view expressed in the Staff Study that this provision places the Attorney General in an ambiguous and inappropriate position. The Attorney General's ultimate responsibility for professional policy must be confined to certain essential matters, to be defined later in this chapter, and must be exercised as the Attorney General and not as a voting member of the Benchers. Indeed, given the important role of the Lieutenant Governor in Council in approving the regulations of professional governing bodies, shortly to be discussed in more detail, it would seem inappropriate for any member of the Executive Council of Ontario to sit on a professional governing council, whether *ex officio* or as a member elected in his own right.

In the case of the legal profession, we recognize the need to balance this general principle against the traditional view of the

¹²Institute of Chartered Accountants of Ontario, Brief to the Professional Organizations Committee, April, 1979, pp. 30-31; Society of Management Accountants of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 16; Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 4; Consulting Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 5.

Attorney General as the senior law officer of the Crown and the “first lawyer of Ontario.” In recognizing this tradition, we support the principle of the Attorney General having *ex officio* status as a Benchers; however, we recommend that he not have voting privileges.

We would not, then, have the Lieutenant Governor in Council constrained by statute to appoint non-professional members of professional governing councils from specific categories of interest. We would, however, note the desirability of achieving over time a judicious representation of allied professional, paraprofessional, employer, and general interests through these appointments. In this regard, we would further note the desirability of having these “lay” appointees remunerated by the public treasury, as is currently the case for lay Benchers of the Law Society. Individuals in certain categories of non-professional interest, such as paraprofessionals, or household clients, may be less able than others to bear the financial sacrifice entailed in participation in the time-consuming activities of professional councils. If individuals are compensated for at least some of these costs, it may be possible for a wider range of interests to be represented on the governing councils.

The appropriate numbers or proportions of lay representatives are difficult to specify. The size of governing councils and the relevant categories of non-professional interests to be considered vary across professions. We would urge, however, that a minimum of two non-professional representatives be appointed to each governing council to provide some mutual support for non-professional interests. Accordingly, *we recommend that:*

- 2.1 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the Lieutenant Governor in Council shall appoint to the governing council of each licensing body not fewer than two persons who are not members of the relevant profession.
- 2.2 The Lieutenant Governor in Council should take due note of the desirability of appointing non-professional members to professional governing bodies in such a manner as to achieve a judicious representation of allied professional, paraprofessional, employer, client, and general interests.

- 2.3 *The Professional Engineers Act* should be amended so as to delete the provision that one member of the Council be a barrister and solicitor; and *The Law Society Act* should be amended to remove the voting privileges currently vested in the Attorney General of Ontario as a Bencher of the Society.

C. Individual Rights Before Professional Governing Bodies

In the course of discharging their regulatory functions, professional governing bodies are often called upon to exercise discretion in individual cases. These cases fall into two general categories: complaints lodged against individual professionals by clients, other professionals, or other parties; and applications for registration with the professional body.

C.1 Complaints and Disciplinary Procedures

This first category has been the focus of the greater public concern. Among the four professions under review, this concern has been greatest with respect to the legal profession.¹³ In part, this may be due to the different composition of the legal clientele, which includes a larger household sector than do the clienteles of the other three professions. Corporations, to a greater extent than household clients, might be expected to possess the economic power and the sophistication necessary to resolve their disputes with professionals without recourse to professional governing bodies. It is also the case, however, that the complaints procedure of the Law Society of Upper Canada came under particular criticism in the comprehensive working paper which was prepared for us by Professor Barry Reiter.¹⁴ Until recently, complaints files could be closed unilaterally by a member of the staff of the Law Society, and complainants had no recourse from staff decisions. Furthermore, the style of the staff in dealing with

¹³Professional Organizations Committee, *Transcripts of Public Meetings with Interested Individuals*, June 19 and 20, 1979, pp. 2,182-2,190; 2,221-2,234; 2,262-2,274; 2,293-2,314; 2,341-2,357; and 2,413-2,424. See also Ellen Roseman, "Law Society's Power Challenged," in *The Globe and Mail*, June 19, 1979; and Ellen Roseman, "Lawyers' Self-Policing under Scrutiny," in *The Globe and Mail*, July 10, 1979.

¹⁴Barry J. Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, Working Paper #11 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), pp. 66 and 105-109.

complaints on an initial basis seems, in a number of cases, to have been perceived to be unnecessarily brusque.¹⁵

The Law Society itself has responded commendably to this public concern. In June, 1979, its Discipline Committee proposed the establishment of a Complaints Review Committee, composed of two elected Benchers and one lay Bencher. Under this proposal, a complainant dissatisfied with the initial decision of a staff member may appeal that decision to a senior member of the Discipline Committee of the Law Society. If the complainant remains dissatisfied with the disposition of his case at this level, then he may appeal to the Complaints Review Committee, whose membership would not include the senior Bencher who originally heard the case.¹⁶

Disciplinary hearings of the Law Society are held in accordance with procedural safeguards specified in *The Law Society Act* and *The Statutory Powers Procedure Act*. Once a disciplinary hearing has been held, and a decision made, that decision may be appealed to the courts, but only by the member of the Law Society against whom a disciplinary order has been made, and not by the original complainant.¹⁷

In engineering, complaints to the Association of Professional Engineers of Ontario are originally screened by the staff, who may dispose of the case or refer it to the Practice and Ethics Committee which conducts an informal investigation. This Committee may either dispose of the case or refer it to the APEO Council for a formal disciplinary hearing. A complainant dissatisfied with either a staff or a Committee decision may swear a formal complaint triggering the formal disciplinary process, provided he is prepared to bear the cost of the proceedings. In such cases, Council may decline to proceed after hearing the complainant state his case. The legal foundation for complainant and Council action in such cases is unclear.¹⁸ However

¹⁵This point was made to us in briefs, during presentations by individuals at our public meetings, and in assorted correspondence.

¹⁶Law Society of Upper Canada, "Report of the Discipline Committee to a Special Convocation of Benchers regarding Complaints Review Procedure," (mimeo., August, 1979).

¹⁷R.S.O. 1970, c. 238, s. 44. It is arguable that in some respects *The Law Society Act* and *The Statutory Powers Procedure Act* are in conflict. For example, the former requires that disciplinary hearings should normally be held *in camera* [R.S.O. 1970, c. 238, s. 33(4)], while the latter generally requires hearings to be open to the public (S.O. 1971, c. 47, s. 9).

¹⁸Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 14, p. 188.

initiated, disciplinary cases are heard in accordance with procedures specified in *The Professional Engineers Act* and *The Statutory Powers Procedure Act*. Again, as in the case of the legal profession, a disciplinary order may be appealed to the courts by the person against whom the order has been made.¹⁹

Procedures in architecture are very similar to those in engineering. Complaints which cannot be resolved by the staff of the Ontario Association of Architects are referred to its Professional Conduct Committee. The chain of screening and referral of complaints then runs from the Professional Conduct Committee to the Council of the Ontario Association of Architects, and finally to its Registration Board. Only at the final stage, the Registration Board, are formal disciplinary hearings held; and they are held in accordance with procedures laid down in regulations under *The Architects Act* and in *The Statutory Powers Procedure Act*.

A complainant dissatisfied with the disposition of his case by the Professional Conduct Committee or the OAA Council may, as in the engineering profession, swear a formal complaint triggering action by the Registration Board, as long as he is prepared to bear the costs of the proceedings. Whether or not the Board could decline to proceed with such cases is, again, unclear.²⁰ Rights to appeal disciplinary decisions to the courts are limited to persons against whom disciplinary orders are made.²¹

Finally, the accounting organizations which, under our recommendations in Chapter 6, would become licensing bodies in public accounting show considerable diversity, not only in the levels of their disciplinary activity, but also in their complaints and disciplinary procedures. The Institute of Chartered Accountants of Ontario (ICAO), a large proportion of whose membership functions as licensed public accountants, is active in disciplinary matters and exhibits well-developed complaints and disciplinary procedures. All written

¹⁹R.S.O. 1970, c. 366, s. 26.

²⁰Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, op. cit. at n. 14, p. 213. The draft revised "Architects Act" proposed by the Ontario Association of Architects provides explicitly that "any person may bring before the Board any complaint of misconduct or incompetence on the part of any member by filing such a complaint under oath in the office of the Secretary of the Board." Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, "Draft of Revised 'Architects Act,'" s.16(d)(iv).

²¹R.S.O. 1970, c. 27, s. 19(1).

complaints are reviewed by the Chairman of the Professional Conduct Committee, who may dispose of a complaint or refer it to the full Professional Conduct Committee, which in turn may dispose of the complaint or refer it to the Discipline Committee for formal hearings in accordance with Institute bylaws and *The Statutory Powers Procedure Act*. Either the Professional Conduct Committee or the member disciplined may appeal a Discipline Committee decision to the Appeal Committee of Council and thence to the full Council.

The Society of Management Accountants of Ontario (SMAO) and the Certified General Accountants Association of Ontario (CGAAO), with much smaller proportions of their membership in public practice, are less active in disciplinary matters. Each, however, provides for a review of all written complaints by a Professional Conduct Committee or a Professional Ethics Committee respectively, and provides for formal hearings by a Review Board composed of members of its governing council. While hearings are not required explicitly to conform with *The Statutory Powers Procedure Act*, the defendant member has a right to legal counsel.

Internal appeal procedures are provided, both for complainants and for disciplined members, from the Professional Conduct or Ethics Committee, as the case may be, to the Review Board and thence to the governing council. The CGAAO provides for a final appeal by disciplined members to the Association itself at its annual general meeting. No appeal to the courts is provided in any of these three accounting organizations, although decisions of the Public Accountants Council to revoke or suspend licences may be appealed to the courts by the person so disciplined.²²

Two concerns emerge from this review of the complaints and disciplinary procedures of professional bodies: one relating to the internal processes of professional bodies; the other relating to external appeals.

C.2 Internal Procedures

The internal structures through which professional bodies conduct complaints and disciplinary procedures are, as outlined

²²The complaints and disciplinary procedures of the various accounting organizations are discussed in Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 14, pp. 110-176, *passim*.

above, roughly similar across professions. They comprise some committee mechanisms for screening complaints, for conducting formal and informal hearings, and in most cases for hearing some internal appeals. The Staff Study suggested that in the interest of all parties to disputes, the structures of professional bodies for dealing with complaints and disciplinary matters ought to be clear and consistent, and proposed that the Complaints and Disciplinary Committees be established by the respective professional statutes.²³ We concur in this proposal, which was generally endorsed by the professional bodies themselves.

There also appears to be a general recognition of the principle that staff officers of professional bodies ought not to be able to dispose definitively of complaints cases. Only in the legal profession has this situation prevailed, and the proposed Complaints Review Committee would redress this problem. The other professions allow for some form of review of complaints by committees of governing councils and often for some form of internal appeal procedure.

In engineering and architecture, this internal appeal procedure extends to recognizing a currently rather uncertain right of complainants to initiate formal proceedings. The Staff Study proposed that such a right be explicitly established by statute.²⁴ Awarding complainants statutory rights to initiate formal hearings, however, necessitates creating some safeguards against the abuse of these rights. Discipline Committees might be empowered to make cost orders against complainants in frivolous cases as recommended in the Staff Study; or Discipline Committees might be given the discretion to decline frivolous cases. Variations of such provisions are currently attempted in engineering and architecture.

Such safeguards are themselves matters of considerable legal dispute, however, as representations to us have suggested.²⁵ Further-

²³Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), p. 185.

²⁴*Ibid.*, p. 186.

²⁵Royal College of Dental Surgeons of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 5; Ontario Ministry of Health, Brief to the Professional Organizations Committee, May, 1979, p. 3; Professional Organizations Committee interviews with the staff of the Office of the Ombudsman of Ontario.

more, the structure of rights and safeguards so created would threaten to over-judicialize the complaints process, and to make excessive demands on the resources of professional bodies. Finally, it is not clear what, if any, powers of investigation a complainant might have as essentially a “private prosecutor.”

For all these reasons, it is our view that prosecutions of disciplinary offences should be undertaken at the discretion of professional bodies as an essential part of their responsibilities to govern their respective professions in the public interest. The complaints procedures of professional bodies should include some mechanism whereby complaints which cannot be satisfactorily resolved at the staff level will be reviewed by a committee of council, but these procedures ought not to provide statutory rights for complainants to initiate formal hearings. Accordingly, *we recommend that:*

- 2.4 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide for the establishment of a Complaints Committee and a Discipline Committee within each licensing body.
- 2.5 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide in each instance that the Complaints Committee shall review, upon request of any party to a complaint, or of the staff of the relevant professional organization, any complaint brought against a member of that organization.
- 2.6 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide explicitly that each professional organization is solely responsible for undertaking disciplinary proceedings.

The rights of persons complained against, as opposed to the rights of complainants, appear reasonably well protected in the professions under review. The professional statutes themselves, together with the provisions of *The Statutory Powers Procedure Act*, ensure the observance of due process in the conduct of disciplinary proceedings, although some concern has been expressed regarding the

procedural aspects of informal hearings conducted by the Association of Professional Engineers of Ontario and the Ontario Association of Architects.²⁶ If the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario are to assume the licensing function in public accounting from the Public Accountants Council, they will each become subject to the provisions of *The Statutory Powers Procedure Act*, and their statutes ought to specify procedures for disciplinary proceedings. Accordingly, *we recommend that:*

- 2.7 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should specify procedures for disciplinary proceedings, establishing rights to notice, rules of evidence, and rights to counsel, subject to the provisions of *The Statutory Powers Procedure Act*, and should provide that disciplinary orders may be appealed to the courts, on questions of law or fact, by the person against whom the order is made.

Two incidental matters have arisen with respect to the rights of disciplined members. In the first place, we have heard representations that the Discipline Committee ought to have the power to award costs against a disciplined member.²⁷

The costs of disciplinary proceedings may be substantial. Where the cause of the proceedings is clearly the professional misconduct or incompetence of an individual, such costs would seem to constitute an undue burden for the professional body.²⁸ Indeed, imposing such costs upon the professional body in effect penalizes the profession for the conscientious policing of its members. We take the point made by McRuer that the power to award costs ought to reside, not with non-judicial bodies, but with the courts.²⁹ Nonetheless, we believe that

²⁶Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 14, pp. 185 and 209.

²⁷Ontario Association of Architects, "Comments on a Working Paper commissioned by the Professional Organizations Committee entitled, *Discipline as a Means of Assuring Continuing Competence in the Professions*," September, 1978, p. 5; Royal College of Dental Surgeons of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 5.

²⁸See Chapter 9 for a discussion of the necessity of specifying professional incompetence, as well as professional misconduct, as a cause for disciplinary action.

²⁹Ontario, Royal Commission Inquiry into Civil Rights, *Report*, *op. cit.* at n. 2, p. 1,197.

the principle underlying McRuer's position is upheld as long as cost orders can be appealed to the courts for review.³⁰ With this proviso, Discipline Committees ought to be able, in their discretion, to require that the costs of a disciplinary proceeding be borne by the offending member. Accordingly, *we recommend that*:

2.8 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the Discipline Committees of each body may require that the costs of a disciplinary proceeding be borne by a member found guilty of professional misconduct or incompetence, and that in such cases, the disciplined member may apply to the courts for a review of the cost order.

As a second matter, it has been suggested to us that there be an internal appeal for disciplined members from a Discipline Committee to the governing council—as is the case in a number of professions—as a potential means of resolving cases before they reach the courts.³¹ In our view, the need for such an internal process is best determined by each individual body, which may make the relevant provisions by regulation.³² The need for avenues of external appeal from discipline decisions of professional bodies is addressed in the next section.

C.3 External Appeal

In each of the four professions under review, decisions of disciplinary bodies may be appealed to the courts on questions of law or fact by the member against whom a disciplinary order has been made, but not by the original complainant. We have advocated (in Recommendation 2.7, above) that provisions for appeal by disciplined members be retained. There is little argument that decisions affecting the livelihood of a person as intimately as do disciplinary decisions must be open to testing in the courts.

³⁰The Law Society of Manitoba's "Report of the Special Committee on Competence," chaired by The Honourable R.J. Matas (mimeo., March, 1977), has led to a draft bill to amend *The Law Society Act* of Manitoba to provide (*inter alia*) for cost orders against lawyers found guilty of incompetence and registration of such orders in the court, whereupon they would become judgements of the court.

³¹Institute of Chartered Accountants of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 30.

³²As recommended below (Recommendation 2.11), a regulation made under a professional statute should not come into force until it has been approved by the Lieutenant Governor in Council on the recommendation of the Minister.

We have made the further point that there are good reasons not to allow individual complainants a right of private prosecution, given the cumbersome safeguards which such a right would entail. It would follow that complainants, not being parties to disciplinary hearings, ought not to have a right to appeal the outcomes of those hearings.

It remains to consider what redress a complainant is to have against the decision of a professional body. If, as we have argued, a complainant is to have no right to demand a formal hearing of his case by a professional body, and no right to appeal disciplinary decisions of professional bodies, he must nonetheless have available some mechanism of impartial external review of his complaint.

There appears to be a general public perception that professional governing bodies ought not to be able unilaterally to dispose of complaints. It is this perception which led to the creation of the Health Disciplines Board to bring an impartial "lay" perspective to the adjudication of client complaints in the health professions. The Staff Study addressed this issue at some length. We agree that the operations of the Health Disciplines Board ought not to be disrupted by extending its mandate to encompass the professions of accounting, architecture, engineering, and law. We further agree that the likely workload of a review agency for the four professions under study is not likely to be sufficient to justify the creation of a separate board with full adjudicatory powers.

The Staff Study proposed instead that the jurisdiction of the Office of the Ombudsman of Ontario be extended to include professional organizations. We see much merit in the spirit of this proposal, which was intended to make available an informal intercessor on behalf of complainants before professional bodies, bringing a fresh perspective to the assessment of cases, and not excessively judicializing the complaints process. However, we are again mindful of the criticisms of this proposal which emerged in briefs and public meetings.

The Office of the Ombudsman now has a large staff to handle a heavy volume of complaints against government agencies. Professional organizations are not agencies of government in the same sense as those currently within the Ombudsman's jurisdiction. It appears to us inappropriate that complaints against professional bodies should be dealt with as a small part of the workload of an organization whose major focus is upon government agencies more strictly defined.

We would recommend the establishment of a mechanism more suited to dealing with professional bodies—an Office modelled on the English Lay Observer. The Office of the Lay Observer is created by *The Solicitors Act, 1974* which empowers the Lord Chancellor to appoint one or more persons, who shall not be barristers or solicitors, as “lay observers” to examine “any written allegation made by or on behalf of a member of the public concerning the [Law] Society’s treatment of a complaint about a solicitor or an employee of a solicitor.”³³ It should be noted that the Lay Observer, strictly speaking, investigates allegations regarding the Law Society itself, not regarding individual solicitors. It is the Law Society’s treatment of complaints with which he is concerned, not the merits of the complaint itself. In many cases, nevertheless, it is necessary for him to touch upon the merits of a complaint in assessing the adequacy of its treatment. The English Law Society is required by *The Solicitors Act* to “furnish a lay observer with such information as he may from time to time reasonably require.”³⁴

The Lay Observer functions much like an Ombudsman: he has no powers to overrule the Law Society, but rather makes reports and recommendations to the Law Society, to complainants, and to persons complained against. He also submits an annual report to the Lord Chancellor, summarizing his caseload and providing a general assessment of the manner in which the Law Society has discharged its functions in dealing with complaints.

The Lay Observer’s caseload appears to have justified the creation of the Office, without involving excessive resource demands. In his first two years (February, 1975 to January, 1977), the Lay Observer received 742 written complaints. Of these, 289 fell within his jurisdiction. In 23 cases the Lay Observer reported that he felt the Law Society’s treatment of the case was incomplete, and in 6 of these cases he recommended that the Council of the Law Society reconsider the complaint.³⁵

³³*The Solicitors Act, 1974*, c. 47, s. 45(1) (England). The institution of the Lay Observer is discussed in Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 14, pp. 265-269.

³⁴*The Solicitors Act, 1974*, c. 47, s. 45(9) (England).

³⁵England, Office of the Lay Observer, First and Second Annual Reports of the Lay Observer under Section 45 of *The Solicitors Act, 1974*; included as Appendix IX in Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 14, pp. 143-158.

The jurisdiction of the Lay Observer in England and Wales is confined to allegations regarding the Law Society. It appears to us, however, that this concept could equally well be applied in other professional areas. In the Ontario context, therefore, we would recommend that a Lay Observer's Office be created with jurisdiction over the self-regulating licensing bodies in accounting, architecture, engineering, and law.

We are aware that the recent Report of the Royal Commission on Legal Services (the Benson Report) in England recommended the involvement of lay persons in the investigation and adjudication of complaints by the Law Society and expressed the view that given such involvement, the Office of the Lay Observer might well become redundant.³⁶ We must differ with the Benson Report in this matter, at least in the Ontario context.

In this province, as noted, complainants dissatisfied with the disposition of their cases by the Complaints Committees of the governing bodies of the health professions (all of which include lay representatives) may appeal to the Health Disciplines Board. In that context, it appears inequitable not to provide a mechanism for the external review of complaints in the other major professions under review here.

Furthermore, we cannot agree that the involvement of lay persons as members of professional bodies dealing with complaints obviates the need for an external review of those activities. In this sensitive area, the maxim that procedures and decisions must not only be fair, but also be seen to be fair holds particularly true. However great the quality of lay appointees and however impartial their views, there will always remain the potential public perception that their continued and close association with professional organizations will incline them simply to reflect the professional viewpoint.

Indeed, public reaction to the Benson proposals, as expressed in some media reports, was to discount those proposals as amounting to the adoption of "the legal profession's views on almost every major issue"³⁷ . . . "How did the commission go so wrong? It worked too

³⁶England, Royal Commission on Legal Services, *Final Report*, Vol. One (London: Her Majesty's Stationery Office, Cmnd. 7648, 1979), Recommendation 25.10, p. 338.

³⁷"Sins of Commission," *The Economist*, October 6, 1979, p. 30.

closely with the lawyers' professional bodies.''³⁸ Whatever the merits of this criticism, it does indicate the importance of the appearance as well as the substance of impartiality in the lay assessment of professional decisions. In this specific instance, we must emphasize that only an external, independent, and non-professional review of the disposition of complaints by professional bodies is likely to be above suspicion. Accordingly, *we recommend that*:

2.9 There should be statutory provisions to:

- (a) provide for the appointment by the Lieutenant Governor in Council of a Lay Observer charged with the duty to investigate allegations by, or on behalf of, members of the public concerning the way in which complaints against professionals are treated by the self-regulating licensing bodies in accounting, architecture, engineering, and law;
- (b) provide that the person appointed as Lay Observer shall not be a member of any of the licensing bodies within his or her jurisdiction;
- (c) provide that the professional organizations within his or her jurisdiction shall provide the Lay Observer with such information as he or she may from time to time reasonably require;
- (d) provide that the Lay Observer shall report the result of each of his or her investigations to the professional organization concerned, to the complainant, and, where appropriate in his or her judgement, to the person complained against; and
- (e) provide that the Lay Observer shall submit an annual report of his or her activities in each professional area to the Legislature through the Minister to whom the administration of the relevant professional legislation may from time to time be assigned. The format of the annual report shall be at the discretion of the Lay Observer, but shall not include the names of individual parties to complaints.

³⁸*Ibid.*, p. 32.

C.4 Refused Applicants

There is a second major area in which the exercise of powers by professional governing bodies raises questions of individual rights. This area involves cases in which a refusal of admission to membership is contested by the refused applicant. As in the case of complaints and discipline procedures, such cases raise considerations of avenues of internal and external appeal.

In two of the professions under review—law and engineering—an applicant for membership has a statutory right to a hearing by a committee of the governing council of the licensing body before he can be refused membership in the body.³⁹ The draft revised “Architects Act” proposed by the Ontario Association of Architects also contains such a provision.⁴⁰ Furthermore, *The Professional Engineers Act* and *The Public Accountancy Act* both provide that refused applicants have a right of appeal to the courts, on questions of law or fact, parallel to the right of those whose licences are suspended or revoked.⁴¹ Again, the OAA’s draft revised “Architects Act” also contains such a provision.⁴²

The Staff Study proposed that applicants who have been refused registration should have the right to a formal hearing before a statutorily based Registration Committee from which appeal would lie to the courts. The responses to this proposal indicated general agreement, although again it was suggested that a route of internal appeal might also be provided.⁴³ The mechanisms of internal appeal are, in our opinion, a matter for the professional bodies themselves to determine and to provide for by regulation.⁴⁴ It is, however, necessary to provide clearly and explicitly, by statute, for a right to formal hearings subject to court appeal for refused applicants. Accordingly, *we recommend that:*

³⁹*The Law Society Act*, R.S.O. 1970, c. 238, s. 27(4); *The Professional Engineers Act*, R.S.O. 1970, c. 366, s. 25.

⁴⁰Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, “Draft of Revised ‘Architects Act,’” s. 11(iii).

⁴¹*The Professional Engineers Act*, R.S.O. 1970, c. 366, s. 26; *The Public Accountancy Act*, R.S.O. 1970, c. 373, s. 21.

⁴²Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, “Draft of Revised ‘Architects Act,’” s. 21.

⁴³Institute of Chartered Accountants of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 30.

⁴⁴Again, as in n. 32 above, we note the relevance here of Recommendation 2.11 that professional regulations should not come into force before being approved by the Lieutenant Governor in Council on the recommendation of the Minister.

- 2.10 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide for the creation of a Registration Committee within each professional organization and provide that any person refused admission to the respective professional organization shall be entitled to a hearing by the Registration Committee, from which an appeal would lie, on questions of law or fact, to the courts.

D. Ministerial Responsibility

D.1 Review of Regulations

There is general agreement that some types of promulgations of professional regulatory bodies ought to require the approval of the Lieutenant Governor in Council before coming into force. This principle currently obtains in three of the four professions under review, was endorsed by the Staff Study, and was accepted by all professional groups. We have also heard the argument that the power of the Lieutenant Governor in Council ought to extend beyond the approval function to include the power to initiate and pass regulations under the professional statutes, as is the case in *The Health Disciplines Act*.⁴⁵ We note however, that, as yet, this power has not been used under *The Health Disciplines Act*, and it would conceivably be used only in the case of an impasse between the Lieutenant Governor in Council and a professional governing body. We would agree with the Staff Study that such an impasse, were it to occur, would be more appropriately resolved through the Legislature than by the unilateral action of the Lieutenant Governor in Council.⁴⁶

If Lieutenant Governor in Council approval is to have any effect, it should be preceded by an appropriate review of proposed regulations. The proper locus for this responsibility is with the Minister to whom the administration of the enabling professional legislation has been assigned. We have no comment to make regarding whether the

⁴⁵Ontario Ministry of Health, Brief to the Professional Organizations Committee, May, 1979, p. 4.

⁴⁶Trebilcock, Tuohy, and Wolfson, *op. cit.* at n. 23, pp. 212-214; Peter Aucoin, *Public Accountability in the Governing of Professions*, Working Paper #4 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), p. 75.

professional legislation under review ought to continue to fall within the Attorney General's portfolio. The make-up of portfolios is traditionally and appropriately at the discretion of the Premier. Accordingly, in referring to the Minister in the following recommendations, we mean the Minister to whom the administration of the respective professional statutes has from time to time been assigned.

Existing legislation requires some revision in this respect. While any regulation made under *The Law Society Act* and *The Professional Engineers Act* currently requires the approval of the Lieutenant Governor in Council before coming into effect, only "disciplinary" regulations made under *The Architects Act* require such approval. Regulations made under *The Public Accountancy Act* do not require approval before coming into effect, but may be annulled by the Lieutenant Governor in Council.

In none of the professions under review is there any explicit statutory requirement that regulations be reviewed by a Minister before being presented to the Lieutenant Governor in Council for approval. We are mindful that such prior ministerial review is required under *The Health Disciplines Act*.⁴⁷ In our view, an explicit requirement for ministerial review is desirable in the professions under study here as well, if only to avert the possibility that some regulations might be presented to the Lieutenant Governor in Council, through the Registrar of Regulations, without the Minister responsible for the administration of the enabling statute having had the opportunity to review the regulation in question. Accordingly, *we recommend that:*

- 2.11 **The statutes establishing each of the self-governing licensing bodies in the accounting, architectural, engineering, and legal professions should stipulate that no regulation made under these Acts shall come into force until it has been approved by the Lieutenant Governor in Council on the recommendation of the Minister.**

E. The Appropriate Subject Matter of Statutory Prescriptions, Regulations, and Bylaws

The need for ministerial review and Lieutenant Governor in Council approval of the regulations of professional bodies is both

⁴⁷S.O. 1974, c. 47, s. 3 (1)(e).

well-established and well-accepted. It remains to consider the thorny question of the appropriate subject matter of these regulations. In so doing, it is necessary to distinguish between matters relating to the internal administration of professional organizations (to be treated in bylaws) and matters of public policy. Within the latter category, it is necessary to distinguish further between matters which must be set out in statute, and those which may be left to be dealt with in regulation.

Let us first consider the content of the entire public policy category. In general, it is our firm view that matters relating to the regulation of entry into, exit from, and conduct within professions must be considered matters of public policy, touching as they do upon a broad range of interests and upon the rights of individuals inside and outside the professions. Furthermore, the state must maintain some degree of control over certain fundamental aspects of the constitution of the professional bodies to which it delegates authority; such constitutional features must be considered matters of public policy.

In distinguishing between those public policy matters to be treated in statute, and those which should be treated in regulation, we would again express a strong preference. In our view, there is an advantage in making professional statutes as “lean” as possible. That is, while it is essential that the objectives of policy and matters involving substantive and procedural rights be set out clearly in statutes, it is also important to economize on the costs of legislative change. Where possible, therefore, detailed prescriptions of the means whereby the objectives of legislation are to be achieved should be dealt with in regulations.⁴⁸ Such an approach promotes economy and flexibility in the legislative process in that it does not require a gearing up of the full legislative apparatus to make periodic changes in detail, while it does maintain the need for changes in public policy to be approved by responsible political authorities.

⁴⁸The landmark statement in Ontario in this regard is that issued by The Honourable J.C. McRuer in 1968:

[Regulations] should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

Ontario, Royal Commission Inquiry into Civil Rights, *Report, op. cit.* at n. 2, p. 378. This principle was endorsed by the Legislative Assembly of Ontario, Standing Committee on Statutory Instruments, *First Report* (mimeo., June, 1978), p. 11.

Existing legislation in the professions under review shows considerable diversity and little conformity with the principles which we have just elaborated. Two of the most outstanding problems are the “overloading” of professional statutes, particularly *The Professional Engineers Act*, with matters of detail; and the leaving of certain matters of public policy to the absolute discretion of professional bodies, particularly in the case of *The Law Society Act*. *The Law Society Act* makes no mention of “bylaws” but rather distinguishes between regulations and “rules,”⁴⁹ the latter not requiring Lieutenant Governor in Council approval. As we shall point out, the category of “rules” includes several matters which ought to be subjects for regulation. Indeed, to emphasize the different nature of the two types of promulgations, *The Law Society Act* ought, like the other professional statutes, to use the terms “bylaws” and “regulations.” More generally, the categorization of subject matters shows considerable inconsistency across professions.

We shall consider the existing state of affairs, and our proposals for change, under two general headings: matters relating to the control of entry, exit, and conduct of individual professionals; and matters relating to the constitution, internal government, and administration of professional bodies. In reviewing existing legislation, we have not included reference to *The Public Accountancy Act* or to the statutes or Letters Patent of the existing accounting organizations because of the changes which we have recommended in Chapter 6 of this Report. The general proposals in our recommendations, of course, ought to be embodied in new legislation establishing the licensing bodies in public accounting.

E.1 Control of Entry, Exit, and Conduct of Individuals

Each professional statute in architecture, engineering, and law sets out certain general requirements for licensure, such as age, residence, citizenship, and good character, and further requires successful passage of professional examinations or exemption therefrom.

Beyond these basic requirements, *The Law Society Act* and *The Architects Act* leave the specification of admission requirements in the

⁴⁹R.S.O. 1970, c. 238, s. 54.

hands of the governing councils of the respective professions, to be set out in regulations. *The Professional Engineers Act*, however, goes considerably further, specifying experience requirements, academic credit against these experience requirements, and evidence of qualification, although it does leave to the governing council of the APEO considerable discretion in granting exemptions from examinations on an individual basis.

Given the need for admission requirements in these professions to keep apace of changes in professional technology and educational institutions, and given the desirability of providing for flexibility in recognizing alternate routes of entry into these professions, we judge that it is inappropriate to entrench specific admission requirements in the statute; and we prefer the general model offered by *The Architects Act* and *The Law Society Act*.

The Law Society Act does, however, present another problem regarding the regulation of entry. *The Law Society Act* empowers Convocation to make regulations “respecting legal education, including the Bar Admission Course.”⁵⁰ The generality of this grant of power seems to us inappropriate. If taken literally, it would empower the Law Society (given Lieutenant Governor in Council approval) to prescribe curricula of faculties of law and hence to encroach upon the jurisdiction of another set of institutions—the universities—whose traditions of autonomy are at least as strong as are those of professional self-governing bodies.

It is unlikely that the Law Society would ever attempt to use its regulatory power in this way; but it is not reasonable to maintain such a general grant of power simply in the expectation that it will never be used. The Law Society, of course, must remain free, as are the other professions under review, to accredit or approve programmes of legal education as qualifying students for admission to professional training programmes or to membership in the profession itself.

Such accreditations ought to be awarded pursuant to a statutory provision or regulation specifying the completion of an “approved” academic programme as an entry qualification; but the accredited programmes themselves need not be identified in statutes or regulations. In other words, while we wish to ensure that the authority to

⁵⁰R.S.O. 1970, c. 238, s. 55.7. Emphasis added.

accredit academic programmes is grounded in statutes or regulations, we wish to make clear that we do not intend that the accrediting of a particular institution or course of studies should require legislative action through either statutes or regulations.

Furthermore, professional bodies ought, of course, to be empowered to prescribe the standards and curriculum of any course of education or training, and the scope and standard of any examination, which they themselves offer. And such prescriptions, involving as they do the portals of the profession, ought to be set out in regulations, subject to Lieutenant Governor in Council approval.

There is yet another anomaly relating to entry requirements in the professional legislation under review. Conditions for the granting of temporary licences are set out specifically in *The Professional Engineers Act*, while *The Architects Act* makes the prescription of these conditions a matter to be treated in regulations, subject to general statutory requirements relating to citizenship and membership in approved architectural associations.⁵¹ *The Law Society Act* allows the conditions for the granting of temporary licences to be set out in "rules" without Lieutenant Governor in Council approval.⁵² In our view, the specific prescription of such conditions, like the specific prescription of requirements for ordinary licensure, ought to be set out in regulations.

Finally, we would draw attention to one type of prescription relating to entry which requires statutory weight. As we recommended earlier in this chapter, the procedural rights of persons refused admission to the profession should be set out in statute (see Recommendation 2.10, above).

Let us now turn to a consideration of the related matters of exit and conduct regulation. Exit from the profession may result from disciplinary action, from non-payment of dues, from leaving the jurisdiction, or from resignation. In any case, it involves the loss of a right: the right to practise. Where this right is removed from an

⁵¹*The Professional Engineers Act*, R.S.O. 1970, c. 366, s. 17; *The Architects Act*, R.S.O. 1970, c. 27, s. 10(1)(j).

⁵²R.S.O. 1970, c. 238, s. 54(1). 24.

individual by a professional body in its disciplinary machinery, provisions to ensure that due process is observed must be set out in statute (see Recommendations 2.4, 2.6, and 2.7, above). Beyond this requirement, however, it is not necessary that the statute specify in detail all of the procedures relating to disciplinary activity, or indeed, to voluntary resignations or non-payment of dues.

It has come to our attention, for example, that the requirement in *The Professional Engineers Act* that all members of the Disciplinary Committee of the APEO must be members of the governing council of that body has placed considerable strain upon the time of the twenty-three members of the APEO Council. In order to relax this requirement to allow other members of the APEO to sit on the Disciplinary Committee (as desired by the APEO Council),⁵³ it would be necessary at present to amend *The Professional Engineers Act*—a procedure which in our view constitutes an unnecessary use of the full legislative process.

On the other hand, *The Architects Act* at present errs in the opposite direction. The Registration Board of the Ontario Association of Architects is empowered to make “disciplinary” regulations prescribing the terms on which membership in the Association may be cancelled or suspended, and no procedural rights are set out in the statute.⁵⁴ *The Law Society Act* is the most appropriately drafted in this regard. With respect to cancellation or suspension of membership, it establishes procedural rights in statute, but leaves other procedural matters to be dealt with in regulations.

Finally, with respect to the specification of appropriate professional conduct, the present statutes leave great discretion in the hands of the governing bodies of the professions. *The Professional Engineers Act* authorizes the Council of the APEO, apart from its regulation-making power (and hence apart from the need for Lieutenant

⁵³Letter from Mr. J.E. Benson, President of the Association of Professional Engineers of Ontario, to the Professional Organizations Committee, October 5, 1979.

⁵⁴R.S.O. 1970, c. 27, s. 10(2). The revisions to *The Architects Act* proposed by the Ontario Association of Architects, but not acted upon pending completion of this Report, would set out procedural rights in the Act. The OAA's draft revised act would, indeed, modify several of the provisions of *The Architects Act* outlined in this section. See Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, “Draft of Revised ‘Architects Act’.”

Governor in Council approval), to publish a code of ethics. That Act does, however, provide for "professional misconduct" to be defined in regulations.⁵⁵ *The Architects Act* is silent on the matter of a code of ethics, and on the definition of professional misconduct or professional incompetence.⁵⁶

The Law Society Act empowers Convocation to make regulations "authorizing and providing for the preparation, publication, and distribution of a code of professional conduct and ethics."⁵⁷ The regulation made under this section simply authorizes the Professional Conduct Committee to prepare and publish a Professional Conduct Handbook and provides for its distribution to members.⁵⁸ There is no requirement that the content of the code of ethics be subject to Lieutenant Governor in Council approval, and there is no specific requirement that professional misconduct or professional incompetence be specifically defined.

Furthermore, on a specific point, *The Law Society Act* empowers Convocation to make rules (which, in the vocabulary of the other statutes, would be bylaws) "defining and governing the employment of student members while under articles."⁵⁹ To add to the confusion, the same Act empowers Convocation to make regulations "defining and governing the employment of barristers' and solicitors' clerks."⁶⁰ It is not clear what distinction is being made here, but in any case, promulgations regarding the employment of paraprofessionals and students touch variously upon individual rights, the training of professionals, and potential innovations in the delivery of professional services. Accordingly, such promulgations ought to take the form of regulations subject to Lieutenant Governor in Council approval.

These inconsistent and confusing provisions for governing professional conduct, and the general lack of provisions for accountability in this area, give us great concern. We have stated repeatedly

⁵⁵R.S.O. 1970, c. 366, ss. 9, 7(1) (d).

⁵⁶The OAA's draft revised act would provide for the preparation and publication of a code of ethics (without the necessity of Lieutenant Governor in Council approval), and would provide for "professional misconduct" to be defined in regulations. Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, "Draft of Revised 'Architects Act'," s. 30 and s. 29(a) (vi) respectively.

⁵⁷R.S.O. 1970, c. 238, s. 55.4.

⁵⁸O. Reg. 160/73, s. 23.

⁵⁹R.S.O. 1970, c. 238, s. 54(1).19.

⁶⁰R.S.O. 1970, c. 238, s. 55.6.

throughout this Report that while we are mindful of the need to respect the autonomy of self-governing professions, we are equally concerned that the governing bodies of these professions in turn not be over-zealous in regulating their members. The Staff Study forcefully made the point that the control of conduct within a profession has at least as great an impact upon the provision of professional services as does the control of entry.⁶¹ Furthermore, considerations of due process demand that if “professional misconduct” and “professional incompetence” are to be grounds for disciplinary action, the bases of these charges must be specifically laid out. Codes of ethics and definitions of professional misconduct and incompetence must be set out in regulations, subject to review and approval. There will remain some dimensions of professional misconduct which may need to be stipulated by statute, as we shall propose later in this Report with respect to public accounting.⁶²

Several of the powers currently granted to governing bodies to control conduct in the professions under review not only require us to consider whether these powers should be exercised through statute or through regulation, but also raise substantive issues of policy to be treated later in this Report. For example, *The Professional Engineers Act* currently empowers the Council of the APEO to make regulations defining classes of specialists and qualifications therefor, and controlling the use of specialty designations. We agree that if such a power is to be exercised at all, it ought to be exercised through regulations. However, we shall note in a later chapter our reservations regarding the value of specialty programmes in the professions under review.⁶³ While we are content to leave this power with the APEO at present, we do not recommend its extension to the other professions.

On another matter, we would point out that, at this time, only one of the professional statutes under review, *The Law Society Act*, gives the professional body the power to make regulations “requiring and providing for the examination or audit of members’ books, records, accounts and transactions”; that is, providing the authority

⁶¹Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 23, p. 21.

⁶²See Chapter 6, below.

⁶³See Chapter 9, below.

for practice inspections.⁶⁴ We shall submit in a later chapter that such a power ought to be extended to the other professional bodies as well.⁶⁵

Finally, we would draw attention to our proposal that professional bodies be empowered to make regulations providing for the administration of fee surveys and the publication of the results therefrom.⁶⁶

E.2 The Constitution, Internal Government, and Administration of Professional Bodies

In making judgements about which of these matters are to be treated in statute, in regulation, and in bylaw, we must continue to respect the delicate balance between the principle of self-government on the one hand, and the principles governing the exercise of delegated authority on the other. The state has a legitimate interest in the constitution of the bodies to whom it delegates authority. Within a defined framework, however, the state must respect the ability of a profession to organize itself for the purpose of governing its members, and to determine the most effective means of administering its own affairs.

Professional statutes ought to constitute the governing body as a corporate entity and establish a governing council of specified size. As noted at earlier points in this chapter, professional statutes ought also to provide for the appointment of lay representatives by the Lieutenant Governor in Council (Recommendation 2.1, above); provide for the establishment of Complaints, Discipline, and Registration Committees (Recommendations 2.4 and 2.10, above); and establish procedural rights of members and non-members before professional bodies (Recommendations 2.5, 2.7, and 2.9, above). Beyond these general statutory prescriptions, there are a number of provisions relating to the internal government of professions, which, while requiring governmental review and approval, ought not to be “locked in” by statutory prescription.

⁶⁴R.S.O. 1970, c. 238, s. 55.3.

⁶⁵See Recommendation 9.3, below. We note that the Institute of Chartered Accountants of Ontario has a practice inspection programme currently under consideration. See Chapter 9, Section C, below, and especially n. 8 therein.

⁶⁶See Recommendation 9.1, below.

The professional statutes under review in this section show great diversity in this regard at present. All three statutes incorporate professional organizations and establish governing councils of specific size. Furthermore, all three define the constituencies from which council members are to be elected or appointed (establishing, for example, numbers of practising and academic representatives, at-large and regional representatives, etc.). Geographic electoral districts are defined in *The Law Society Act*, in bylaws under *The Professional Engineers Act*, and through both modes in the case of *The Architects Act*. All three statutes establish terms and in some cases qualifications of council members. *The Architects Act* requires that the electoral procedures (nominating and balloting procedures) for Council and Registration Board members⁶⁷ be set out in regulations; *The Professional Engineers Act* and *The Law Society Act* leave such provisions to be made in bylaws (or “rules”).

As regards officers of the respective bodies, *The Law Society Act* and *The Professional Engineers Act* both establish the positions and terms of office, and provide for electoral procedures to be specified in bylaws. *The Architects Act*, on the other hand, provides for such positions, terms, and electoral procedures to be established in regulations for officers of the Registration Board and in bylaws for officers of the OAA. *The Law Society Act* establishes a quorum for Convocation; *The Architects Act* allows the Registration Board quorum to be specified in regulations and the quorum for its Council in bylaws.

This review illustrates the disparity and complexity of legislative provisions with respect to the internal government of the professions under review. In our view, it is not only simpler but also appropriate to treat in regulations all matters relating to the definition, appointment, and election of the professional membership of governing councils and statutory committees, and of the officers of professional bodies. Such an arrangement leaves the initiative with the professional bodies themselves and provides flexibility for adapting structural and procedural provisions to changes in professional populations and in the volume and nature of the workload of professional bodies. It also

⁶⁷The Registration Board of the Ontario Association of Architects is effectively the governing council of the architectural profession, since it is the body empowered by statute to make regulations. The Council of the OAA is empowered only to pass bylaws. In this section, we are concerned only with the regulation-making body; that is, the Registration Board.

respects the ultimate necessity for changes in governmental structures and processes of bodies exercising delegated public authority to be reviewed and approved by responsible political authorities.

The Staff Study noted the desirability of attaining a balanced representation of intraprofessional interests on professional governing councils and outlined the effects of various constituency definitions and electoral procedures (such as at-large elections and identification of incumbents) upon such a balance. In formulating regulations regarding constituency definitions and electoral procedures, the professional organizations may well wish to take such considerations into account.

We have now to consider matters which are essentially internal to professional bodies and can appropriately be dealt with in bylaws. These matters fall into two general categories: "housekeeping" requirements and member service activities. In the former category, the governing councils of professional bodies are variously empowered to pass bylaws regarding such matters as the keeping of a register, prescribing the seal of the governing body, property management, banking and finance, prescribing dues and forms, providing for the remuneration of council and committee members, establishing and providing for grants to chapters or local associations, establishing procedures for the calling and conducting of meetings, and establishing non-statutory committees. We think that these and like provisions are appropriate and see no need to change them.

Similarly, sections of the professional statutes under review which empower professional bodies to make bylaws providing for member services such as scholarships, lectures, continuing education programmes, benevolent funds, liaison with other organizations, the designation of honorary and associate members, etc., seem appropriate. We do, however, have reservations regarding one "member service" provided by the Law Society without the necessity for governmental review and approval—that is, the Law Society's mandatory errors and omissions insurance plan.⁶⁸ Where member services are

⁶⁸R.S.O. 1970, c. 238, s. 53. This section authorizes the Society to:

... make arrangements for its members respecting indemnity for professional liability and respecting the payment and remission of premiums in connection therewith and prescribing levies to be paid by members or any class thereof and exempting members or any class thereof from all or any part of any such levy.

mandatory as a condition of continued retention of the right to practise, their provision ought to be governed by regulations. Similarly, were any professional organization to provide a mandatory continuing education programme, although we do not recommend such a move,⁶⁹ the programme ought to be mandated in statute and governed by regulation.

E.3 Residual Matters

No listing of legislative matters can exhaust the possible areas of professional activity in the future, and the question of how to allocate residual matters must be addressed. In order to avoid the twin pitfalls of, on the one hand, overloading the regulation-making process with administrative minutiae which could not have been foreseen, or, on the other, allowing an unanticipated but important matter of professional policy to be disposed of without governmental review and approval, we would propose two residual clauses.

The list of regulation-making powers might have a residual clause to the following effect: “regarding such other matters as are entailed in carrying out the purposes of this Act.” The list of bylaw-making powers might have a residual clause to the following effect: “regarding such other matters as are entailed in carrying on the business of the governing body and are not included in the enumerated heads of regulation of this Act.”

E.4 Summary

In this rather extensive section, we have set out our views regarding the appropriate allocation of subject matters among statutes, regulations, and bylaws. The general principles which have guided us in making these judgements are as follows.

The statutes setting up the framework of licensure in the four professions under review ought to establish the self-regulating governing bodies, outline the basic constitutional framework for those bodies, and establish the general principles of entry and conduct regulation within which they are to operate. Accordingly, governing councils of specified size, Lieutenant Governor in Council appointees

⁶⁹See Recommendation 9.5, below.

to those councils, and Complaints, Discipline, and Registration Committees should be provided for in the statutes. Furthermore, the procedural rights of individuals in their dealings with professional bodies must be statutorily guaranteed. The general categories of the qualifications necessary for licensure should be provided for; that is, it must be made clear which of such factors as academic qualification, professional examination, practical experience, citizenship, residence, age, and good character are relevant to licensure. In addition, some aspects of the regulation of the conduct of individual professionals, such as the definition of certain dimensions of professional misconduct, or provisions for professional corporations, may be so central to public policy towards the profession that they should be stipulated in the statutes.

The regulation-making power of professional bodies, subject always to approval by the Lieutenant Governor in Council upon the recommendation of the Minister, should extend to the detailed prescription of matters of public policy related to the representation of intraprofessional interests in the internal government of the profession and to the admission, conduct, and expulsion of individual members. Accordingly, regulations are the appropriate instruments for prescribing the mechanisms whereby the professional membership of governing councils and statutory committees is to be elected or appointed; for specifying the academic and practical experience requirements for licensure; for prescribing the standards, curricula, or scope of courses of training or examinations offered by professional organizations themselves; for defining professional misconduct and incompetence, and prescribing codes of ethics; and for treating other specific matters relating to the conduct of individual practitioners.

Finally, it is appropriate to leave to bylaws, which are totally at the discretion of the professional organization and do not require Lieutenant Governor in Council approval and ministerial review, matters relating to the internal administration of the professional organization and the provision of services to members on a voluntary basis.

Some of these matters have been treated in recommendations earlier in this chapter; others will be treated later in this Report. At this point, it is useful to set out a categorization of subject matters, which, while not exhaustive, can be taken together with our other

recommendations as indicating our judgements regarding the appropriate subjects of statutory and subordinate legislation. Accordingly, *we recommend that:*

2.12 *The Law Society Act* should be revised to remove reference to “rules,” and to empower Convocation to make “regulations” and “bylaws.”

2.13 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should include provisions:

- (a) establishing the respective professional organizations as corporate bodies, and establishing governing councils of these bodies, of specified size, whose professional membership is to be composed as specified in regulations under the respective Acts; and
- (b) establishing general requirements for licensure, such as age, residence, citizenship (in the case of the legal profession), the passing of a professional examination, and the meeting of such academic and experience requirements as are specified in regulations under the respective Acts.

2.14 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should empower the governing councils of those bodies to make regulations subject to the approval of the Lieutenant Governor in Council regarding:

- (a) the academic, experience, and other requirements for admission into professional training programmes and into licensed practice;
- (b) qualifications for temporary licensure, and the conditions to be placed upon such licensure;
- (c) the curricula and standards of professional training programmes offered by the professional organization itself;

- (d) the scope and standards of any examination administered as an entry requirement by the professional organization itself;
- (e) the definition of professional misconduct and incompetence;
- (f) the content of codes of ethics;
- (g) specialty designations;
- (h) the employment of professionals in training during apprenticeship or articling periods;
- (i) the audit and inspection of members' books, accounts, and transactions;
- (j) the conducting of fee surveys, and the publication of the results therefrom;
- (k) the definition of the constituencies from which members of the respective governing councils are to be elected or appointed, and the number of representatives from each constituency;
- (l) where relevant, the definition of geographic electoral districts for elections to the governing council;
- (m) the positions of officers of the governing body and mechanisms of their selection;
- (n) the nominating and balloting procedures for intra-professional elections;
- (o) the composition of the membership of statutory committees; the mechanism of their appointment; and the procedures ancillary to those stipulated in the statute relating to their activities;
- (p) quorums for the governing council and statutory committees;

- (q) such other matters of public policy as the Legislature may deem appropriate to enumerate in the statute; and
- (r) a residual category defined as “such other matters as are entailed in carrying out the purposes of this Act.”

2.15 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide for the making of bylaws regarding matters of internal administration and services to members, for example:

- (a) property management;
- (b) banking and finance;
- (c) membership dues, and forms;
- (d) remuneration of council and committee members;
- (e) non-statutory committees;
- (f) procedures for the calling and conducting of meetings;
- (g) the establishment of, and grants to, chapters or local associations;
- (h) scholarships, lectures, and continuing education programmes;
- (i) benevolent funds;
- (j) insurance programmes;
- (k) liaison with other organizations;
- (l) the designation of honorary and associate members;
- (m) such other matters of internal administration and member service as the Legislature may deem appropriate to enumerate in the statute; and

- (n) a residual category to be defined as “such other matters as are entailed in carrying on the business of the [governing body] and are not included in the section [enumerating heads of regulation] of this Act”.

2.16 Where participation in a programme offered by a professional organization is a condition of continued retention of the right to practise, the provision of such a programme should be governed by regulations. In particular, *The Law Society Act* should be revised to provide that Convocation may make regulations governing the provision of errors and omissions insurance to its members.

F. Annual Reports

Again, there appears to be general agreement regarding the appropriateness of a requirement that professional regulatory bodies report annually to the Minister to whom the administration of their respective professional statutes is assigned. Such a proposal was included in both the working paper prepared for the Committee by Professor Peter Aucoin and in the Staff Study,⁷⁰ and was generally endorsed in the submissions made to us.

The format of the annual report suggested in the Staff Study also appeared, with one qualification, to be generally acceptable to the professional bodies who would be expected to conform to it. Most professional organizations indicated that the provision of information regarding regulations and bylaws, membership data, complaints and disciplinary activities, applications for registration and their disposition, attrition rates in training programmes, and current policy proposals was both appropriate and feasible. Some concern was expressed, however, that the provision of some of the additional manpower planning data suggested in the Staff Study would prove unduly burdensome on an annual basis.⁷¹

⁷⁰Aucoin, *Public Accountability in the Governing of Professions*, *op. cit.* at n. 46, pp. 105-106; Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 23, pp. 234-235.

⁷¹Professional Organizations Committee, *Transcripts of Public Meetings with Engineering Organizations*, Presentation by the Association of Professional Engineers of Ontario, May 18, 1979, pp. 316-319; *Transcripts of Public Meetings with Accounting Organizations*, Presentation by the Institute of Chartered Accountants of Ontario, June 1, 1979, pp. 846-850.

It has been our experience throughout this inquiry that timely and accurate information regarding the membership and the activities of professional organizations is essential to an intelligent understanding of professional policy and of its effects. It appears to us important, then, that an annual report along the lines suggested in the Staff Study, but without the detailed manpower planning data that was there suggested, be submitted by each professional body to the relevant Minister and be tabled in the Legislature.

Accordingly, *we recommend that:*

2.17 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that each licensing body shall submit an annual report to the Minister, according to such format as the Minister may prescribe, for tabling in the Legislature.

2.18 The Minister(s) charged with receiving the annual reports of professional bodies should consider requiring that they include the following categories of information:

- (a) any regulations and bylaws passed by the council of the professional body;
- (b) membership statistics of the profession by size of firm, location, employment context, and areas of specialty, where appropriate;
- (c) membership statistics of the council and committees of the professional body along the same dimensions;
- (d) a summary of the complaints received against members, categorized by source, type, and disposition of complaints;
- (e) a summary of disciplinary proceedings, categorized by the nature of the charge and the characteristics of the members involved (such as size and location of firm, years in practice, areas of specialty, if relevant);
- (f) a summary of the applications for registration, categorized by place of training (and jurisdiction of

previous registration, if applicable) of the applicant, and the disposition of applications;

- (g) attrition rates at various stages of qualifying programmes;
- (h) an identification of matters of policy currently under review by professional bodies and of any proposed changes in policies or programmes; and
- (i) any other information deemed relevant by the professional body.

G. Periodic Review

Professionals, by definition, are involved in the application of highly complex bodies of knowledge, and as these bodies of knowledge and technology evolve and change over time, so do conditions of practice and so do the effects of professional services upon a wide range of interests. Accordingly, professional legislation should be adapted over time to changing conditions. It has been necessary to undertake a review of the legislation in accounting, architecture, engineering, and law at this time; and it will be necessary to do so again in the future. We have recommended a number of changes in the legislation governing these professions; whatever recommendations may be implemented, the effects will have to be assessed at some future time. Furthermore, changing conditions will undoubtedly give rise to issues which have not confronted us.

It is our view that reviews of professional legislation ought to be undertaken at more or less regular intervals. It seems to us preferable to undertake reviews at relatively fixed, rather than indeterminate, intervals in order to maintain some sense of order and consistency in the fields under review. Practitioners in the field, as well as other interests, ought to be able to count on a relatively stable set of rules for a recognizable period. We favour the Staff Study proposal of a provision in professional statutes triggering review at ten-year intervals.

Let us be clear that we are not recommending a “sunset” provision: professional statutes would not, under our recommendation, expire every ten years, but they would contain a provision requiring that they be reviewed. The mechanism for this review ought

to be at the discretion of the Lieutenant Governor in Council. Accordingly, *we recommend that:*

- 2.19 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should stipulate that the Lieutenant Governor in Council shall cause a review of each statute, and its effects, to be undertaken at ten-year intervals, the results to be tabled in the Legislature.**

H. A Special Consideration: the Distinction Between Member Service and Regulatory Activities

Rather late in our deliberations, we were asked to consider a matter which raises important issues of principle and extremely complex practical considerations. In a brief presented at our public meetings, the Canadian Society for Professional Engineers (CSPE), a recently founded voluntary association of salaried engineers, submitted that the activities of the Association of Professional Engineers of Ontario (APEO) go far beyond those which might properly be engaged in by a regulatory body.⁷² On this argument, the APEO, a regulatory body instituted to promote the public interest in the practice of engineering, ought not to engage in services directed to the enhancement of the welfare and status of engineers themselves. The APEO's involvement in such activities, we were told, not only blurs the essential distinction between the public and the private interest in professional regulation, but also militates against the development of voluntary associations, such as the CSPE, which might more properly perform member service functions.

At our invitation, the CSPE submitted a subsequent brief elaborating its position. The Society noted the involvement of the APEO in such activities as salary surveys, employment counselling, public relations, and the provision of life insurance to members. It maintained that, as a corporation established in a specific statute with specified objects, the APEO ought not, under the legal doctrine of

⁷²Canadian Society for Professional Engineers, Brief to the Professional Organizations Committee, April, 1979; Professional Organizations Committee, *Transcripts of Public Meetings with Interest Groups*, Presentation by the Canadian Society for Professional Engineers, June 14, 1979, pp. 1,396-1,426.

corporate *ultra vires*,⁷³ to engage in activities beyond those relating to its enumerated objects and powers, which relate to the maintenance of standards of knowledge, skill, and ethics in the practice of engineering consistent with the public interest. It was noted, however, that *The Corporations Act* in Ontario has complicated the application of the corporate *ultra vires* doctrine.⁷⁴ And in the Society's view, the situation is further complicated by the statutory granting to the APEO of powers which extend beyond its stated objects. We were asked by the Society to recommend revisions to *The Professional Engineers Act* and *The Corporations Act* ensuring that the APEO might make regulations and undertake activities only within the enumerated objects of the Association.

In principle, we agree that it is desirable to distinguish activities of professional organizations which are directed towards the enhancement of private professional interests from those which are directed towards the promotion of the public interest. It may be further desirable, in principle, that these two categories of activities be carried on by distinct organizations.⁷⁵ Indeed, an organizational

⁷³Briefly, the doctrine of corporate *ultra vires*, as it has been developed and applied by the courts, makes a distinction between "common law" and "statutory" corporations. In the former category, generally comprising corporations incorporated by Letters Patent, the capacities of a corporation, and hence the effectiveness and validity of its acts, have been held to be those of a natural person. In the latter category, comprising corporations with a specific statutory base, the capacities of a corporation have been held to be limited to those implied in its enumerated objects and powers. In either case, however, the legislature may extend, restrict, or otherwise modify this principle through express statutory provision. In Ontario, *The Corporations Act* (R.S.O. 1970, c. 89) provides:

- s. 2 This Act does not apply to a company to which *The Business Corporations Act* applies. . . .
- s. 302 Subject to section 2, this Part [Part VIII, entitled "Corporations, General"] except where it is otherwise expressly provided, applies . . .
 - (c) to every corporation incorporated by or under a general or special Act of the Legislature
- s. 304 A corporation, unless otherwise expressly provided in the Act or instrument creating it, has and shall be deemed to have had from its creation the capacity of a natural person.

⁷⁴Canadian Society for Professional Engineers, Brief to the Professional Organizations Committee, June, 1979, p. 4. See also n. 73, above.

⁷⁵A similar point was made in Aucoin, *Public Accountability in the Governing of Professions*, *op. cit.* at n. 46, pp. 94-97.

distinction between voluntary and regulatory professional associations has evolved in a number of professions, notably the health and legal professions.

In practice, however, it is virtually impossible to specify two distinct areas of jurisdiction, one relating to private and one to the public interest. There are activities which are within the powers of the APEO as a regulatory body, and there are others which are outside its powers; but these matters cannot be specified in two mutually exclusive and exhaustive lists. The area of overlap between “public” and “private” interest activities is very broad. As we stated in Chapter 1, the regulation of the professions requires a continual balancing of a variety of interests, including the interests of professionals themselves. Consider, as a very general example, the control entry into a profession. Consider, more specifically, the provision of liability insurance. Both are policies which may generate economic benefits for individual professionals as well as providing protection for non-professional interests.

Even where an organizational distinction between voluntary and regulatory associations has evolved, as in the health and legal professions, it has evolved without restricting regulatory bodies explicitly to carrying out only activities involving public policy. Indeed, even in these professions, the organizational distinctions do not represent watertight compartments of public and private interest—the orientation of the voluntary and regulatory bodies towards member service and public protection respectively is a matter of emphasis and not of exclusivity.

Even if legislative revisions along the lines suggested by the CSPE were enacted, the issue would not likely be resolved. We sought a legal opinion on this matter and were advised that, in the present situation, the determination of the precise limits of the powers of the APEO and similar bodies is a matter for judicial interpretation:

On the other hand, it is apparent from the enactment of sec. 304 of *The Corporations Act*, together with its historic rationale in the decisions of the House of Lords . . . that the Legislature has determined that statutory corporations should not be inhibited by the rigid limitations of the *ultra vires* doctrine. . . . On the other hand, by designating the Association's objects and powers in broad but specific terms it follows, through reasonable implica-

tion, that the legitimacy of the Association's activities should not be construed as wholly unlimited.⁷⁶

Futhermore, we were told that the need for a judicial determination would not likely be removed by amending *The Professional Engineers Act* and *The Corporations Act*. Noting that members of the APEO may well have the right in the current context to contest through litigation certain of the Association's activities, our legal advisor went on to note that:

... it is not clear how the proposed alternative—legislative amendment of *The Corporations Act* and *The Professional Engineers Act*—would eliminate the need for such proceedings, either because issues of fact would still remain whether specific activities were within or beyond the Association's objects and powers as amended, or because the proposed repeal of sec. 304 of *The Corporations Act* (the "extended capacity" section) would raise serious legal questions regarding revival of earlier doctrinal uncertainties which the enactment of sec. 304 was designed to replace. Amendment of the statutes, therefore, would not necessarily eliminate the need for judicial proceedings, of either a declaratory or injunctive character.⁷⁷

Given the virtual impossibility of making sharp distinctions between areas of professional and public interest, and the need to seek judicial interpretation of the extent of corporate powers in any case, we do not recommend any legislative action in this regard.

We would, however, draw attention in this context to our earlier recommendations that any mandatory member service programmes should be provided only pursuant to statutory provisions and regulations requiring Lieutenant Governor in Council approval, while voluntary programmes may be provided through bylaws (Recommendations 2.13, 2.14, and 2.15, above).

In the final analysis, what exists to ensure that professional organizations will use their powers only to serve their main objectives is the sense of responsibility of a self-regulating profession on the one hand, and on the other, the availability of the courts to rule on certain specific cases as they may arise.

⁷⁶Professor Donald B. Spence, Q.C., Memorandum to the Professional Organizations Committee, October 9, 1979, p. 10.

⁷⁷*Ibid.*, pp. 12-13.

Chapter 3 Legal Services and the Licensed Practice of Law

A. The Licensure Regime in Law

The case for subjecting the performance of legal functions to a licensure regime, rather than merely a certification regime,¹ or some other less stringent legal regime (such as reliance simply on civil liability for professional negligence), is strong. Legal services are provided to a wide spectrum of the public including a very substantial household sector that in the absence of a licensure regime would be highly vulnerable to unqualified providers supplying unsatisfactory services. Formidable information costs face this sector in attempting to determine when legal services are required in any particular situation and whether, once they have been provided, they have been competently performed. In addition, significant third party interests are often at stake in many legal transactions and matters: for example, children and other family members in matrimonial and criminal matters; and subsequent purchasers and other interest holders in real estate transactions. Ranging beyond these reasonably specific third party interests is a generalized third party interest that society as a whole has in a well-functioning and widely respected legal system.

In response to considerations such as these, we observe licensure regimes in place in law in every major jurisdiction in the western world. Thus, the general case for licensure in law does not seem open to serious question. Much more difficult questions, however, arise when we move to consider *what* legal functions should be subject to licensure and *who* should qualify for a licence with respect to whatever functions are made subject to licensure. On these two questions, there is not nearly the same uniformity of policy observable throughout western jurisdictions.

On the first question—the scope of licensed functions—section 50 of *The Law Society Act*² provides that no person other than a member of the Law Society of Upper Canada “shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor.” Contravention of this provision is a criminal offence, historically enforced by the Law Society of Upper Canada as a private prosecutor. However, *The Law*

¹For a detailed discussion of the differences between licensure and certification, see Chapter 13, below.

²R.S.O. 1970, c. 238.

Society Act nowhere defines what constitutes practising as a barrister or solicitor, although the courts have held that the drafting of wills, the incorporation of companies, conveyancing, and the processing of uncontested divorces all fall within the scope of the licensed functions protected by section 50.

In contrast, the English *Solicitors Act*³ confines a solicitor's exclusive scope of practice to: (a) preparing deeds of conveyancing and transfer for reward; (b) preparing certain documents for probate; and (c) initiating and conducting certain litigious proceedings. The other provinces of Canada are scattered along the spectrum between these two positions, although generally the scope of licensed functions as defined in provincial law society statutes is quite broad.⁴

While acknowledging that it is somewhat unusual and generally undesirable to attach criminal sanctions to undefined statutory prohibitions, we believe that it would be a nearly hopeless task to attempt to develop an inventory of functions that duly qualified lawyers—and lawyers alone—should be permitted to perform. Functions requiring legal expertise are so pervasive in our society that any attempt to draw up a comprehensive list of functions that should be exclusively assigned to lawyers under the existing licensure regime seems doomed to failure. Moreover, any attempt to impart great precision to the definition of the statutory scope of licensed functions is likely to increase correspondingly the prospects of demarcation disputes with any of a number of allied occupations and activities on the periphery of the legal profession (e.g., insurance brokers, insurance adjusters, patent agents, real estate agents, trust companies, land use planners, accountants, underwriters, labour union grievance officers, stockbrokers, etc.).

There are no live demarcation disputes of any intensity at any of these interfaces at present, and there would seem nothing to be gained by provoking them. On the other hand, groups such as these and the

³*The Solicitors Act*, 1974, c. 47 (England).

⁴See: Alberta, *The Legal Professions Act*, R.S.A. 1970, c. 203; British Columbia, *The Legal Professions Act*, R.S.B.C. 1960, c. 214; Manitoba, *The Law Society Act*, R.S.M. 1970, c. L-100; New Brunswick, *The Barristers Society Act*, S.N.B. 1973, c. 80; Newfoundland, *The Law Society Act*, R.S.N. 1970, c. 201; Nova Scotia, *The Barristers and Solicitors Act*, R.S.N.S. 1967, c. 18; Prince Edward Island, *The Legal Society and Legal Profession Act*, R.S.P.E.I. 1974, c. L-9; Quebec, *Code des professions*, S.Q. 1973, c. 13; and *Loi du Barreau*, S.Q. 1966-67, c. 77; Saskatchewan, *The Legal Profession Act*, R.S.S. 1965, c. 301.

public generally are entitled to some assurance that the licensure regime in law is being administered in a disinterested way, informed exclusively by considerations of the public interest. If legislative definition is not feasible, there are other ways in which a similar public interest perspective can be explicitly introduced into the administration of the licensure regime in law.

One which we believe should be adopted is to subject decisions by the Law Society to initiate prosecutions for unauthorized practice to the approval of the Attorney General, who is a publicly and politically accountable elected official. There is ample precedent for such a provision in many other contexts.⁵ The Ontario Branch of the Canadian Bar Association, in its final brief to the Committee, acknowledged that “such an interposition would help to allay any charges that the Law Society was using the prosecution as a method of protecting its alleged monopoly on the delivery of legal services.”⁶ Accordingly, *we recommend that:*

3.1 Section 50 of *The Law Society Act* should be amended by adding a provision to the effect that no prosecution shall be commenced under this section except with the consent in writing of the Attorney General.

As to the second question noted above—the determination of appropriate qualifications for licensure—we again observe a wide variation in formal educational, practical experience, and practical instruction requirements for lawyers throughout western jurisdictions. However, we have not considered it our task in the course of this study to review in any detail present educational and training requirements for prospective lawyers: this subject was extensively canvassed eight years ago in Ontario by the MacKinnon Committee.⁷

⁵See, for example: *The Beach Protection Act*, R.S.O. 1970, c. 40, s. 10; *The Collection Agencies Act*, R.S.O. 1970, c. 71, s. 37(3); *The Energy Act*, R.S.O. 1970, c. 148, s. 10(2); *The Industrial Standards Act*, R.S.O. 1970, c. 221, s. 19(4); *The Investment Contracts Act*, R.S.O. 1970, c. 226, s. 24; *The Labour Relations Act*, R.S.O. 1970, c. 232, s. 90(1); *The Mortgage Brokers Act*, R.S.O. 1970, c. 278, s. 31; *The Ontario Human Rights Act*, R.S.O. 1970, c. 318, s. 16; *The Police Act*, R.S.O. 1970, c. 351, s. 69(2); *The Private Investigators Act*, R.S.O. 1970, c. 362, s. 32(3); *The Private Sanatoria Act*, R.S.O. 1970, c. 363, s. 52(1); *The Public Commercial Vehicles Act*, R.S.O. 1970, c. 375, s. 17; *The Public Vehicles Act*, R.S.O. 1970, c. 392, s. 24; *The Real Estate and Business Brokers Act*, R.S.O. 1970, c. 401, s. 63(3); and *The Used Car Dealers Act*, R.S.O. 1970, c. 475, s. 33(3).

⁶Canadian Bar Association, Ontario Branch, Brief to the Professional Organizations Committee, April, 1979, p. 99.

⁷Law Society of Upper Canada, *Report of the Special Committee on Legal Education* (Toronto: Law Society of Upper Canada, 1972).

We should note in passing, however, that no evidence of any consequence was brought to our attention which would suggest that the present entry standards for qualification as a lawyer are, in any major respect, inappropriate.

We now turn to a consideration of a number of specific issues that came to our attention in the general context of licensure requirements in law.

B. "Routine" Services

The argument is sometimes made that within the functions customarily performed by lawyers, there are subsets of routine services that can be adequately performed by persons other than lawyers and at a lower cost. Examples commonly cited are residential conveyancing, uncontested divorces, the preparation of wills, and simple incorporations. The case of conveyancing has been particularly controversial.⁸ Because conveyancing is, by a large order of magnitude, the service which members of the general public most frequently buy from lawyers, the costs associated with it have a wide and discernible impact on consumers. Also, because conveyancing forms a major part of many legal practices, the prospect of having to yield a share of this market to other service providers is viewed by many lawyers as a serious threat to their livelihood. A number of studies in Canada and elsewhere are currently examining the costs of conveyancing.⁹ The English Royal Commission on Legal Services has recently recommended, by a majority decision, the retention of the present restrictions on conveyancing for fee or reward.¹⁰

⁸For a discussion of these issues in England, see Royal Commission on Legal Services, *Final Report*, Vol. One (London: Her Majesty's Stationery Office, Cmnd. 7648, 1979), especially Chapter 19, "Restrictions on Practice and Competition" and Chapter 21, "Conveyancing."

⁹For example, Barry J. Reiter and J. Robert S. Prichard, *Housing Transactions Costs in Canada* (a study for the federal Department of Consumer and Corporate Affairs, forthcoming, 1980). In Australia, the New South Wales Law Reform Commission is studying the regulation of the legal profession, and one of the major issues in its terms of reference is an investigation into the costs of conveyancing and possible ways of reducing these costs; in the state of Victoria, a departmental inquiry into the costs of conveyancing has recently been initiated. In the United Kingdom, each of the Royal Commissions on Legal Services in England and Scotland has had, as one of the major terms of its mandate, an inquiry into conveyancing costs.

¹⁰Royal Commission on Legal Services, *Final Report*, *op. cit.* at n. 8, Recommendation 21.3, p. 281.

With the information at our disposal, we are not inclined to recommend that conveyancing, or any other class of so-called “routine” services, should be “carved out” of the existing licensure regime in law and opened up to other service providers. We take this view for a number of reasons: first, to take such a course would necessitate the creation of a new occupation or new occupations to provide these services, presumably under licensure regimes of their own. This would require government involvement in the development of appropriate education and training programmes, and regulatory structures. Such a major enterprise would not seem worth undertaking in the absence of a very compelling demonstration of substantial net benefits therefrom. Second, to follow this course would substantially increase the prospects of the kind of demarcation disputes among licensed professions or occupations that have plagued other professions. Third, there is real difficulty associated with identifying and defining exactly what services are, or are not, routine. In the case of residential conveyancing, some conveyances may in fact be straightforward and could indeed be processed by persons lacking the full training and skills of a qualified lawyer; on the other hand, other residential conveyances may involve complexities the equal of those that are sometimes encountered in much larger commercial transactions. Thus, matching tasks to skills in any exact way is impossible, and an element of arbitrariness and approximation is inevitable no matter how a licensure regime is structured. Fourth, the substantial influx of new lawyers into the profession that has been occurring in the province of Ontario over recent years, with about a thousand new lawyers being added to the profession annually, alleviates concerns over undue restrictions on the supply of legal services. Fifth, to the extent that fee levels are unnecessarily high in some of the more routine service areas at present, we would hope that recommendations which we have made elsewhere in this Report on matters such as price advertising¹¹ would, over time, significantly ameliorate these conditions. Sixth, our recommendation to the effect that the Attorney General’s consent should be required for the initiation of any prosecution for unauthorized practice in law¹² provides some potential for continuous marginal adjustments in the way the licensure regime will apply to the activities of non-lawyer providers functioning in the legal services market. In this respect, we note that the English Royal

¹¹See Recommendations 10.1-10.3, below.

¹²See Recommendation 3.1, above.

Commission on Legal Services has recommended that in relation to the unauthorized performance of conveyancing services, prosecutions should in future be undertaken not by the Law Society but by the police or the appropriate government department.¹³

C. Paraprofessionals: Law Clerks and Legal Secretaries

Both the Institute of Law Clerks of Ontario and the Metropolitan Toronto Legal Secretaries Association made detailed submissions to us regarding their future legal status. Representatives of both groups appeared to accept unreservedly the proposition that their members should continue to function only in employed settings where they were ultimately accountable to a lawyer, or perhaps in limited freelance settings, such as title searching, where the service is provided on a fee-for-service basis to lawyers. Specifically, both groups eschewed any desire or expectation that, now or in the future, their members should be able to provide any class of legal service directly to the public. However, we do note that by virtue of Recommendation 8.3 in this Report, law clerks and legal secretaries should be able to aspire to minority ownership interests in incorporated law firms.

Both groups were concerned that without some additional regulation, wide variations in the quality, competence, and experience of persons performing the functions of law clerks or legal secretaries would continue to hamper law firms in their attempts to hire appropriately qualified support personnel. They also submitted that regulation was desirable in that the better qualified law clerks and legal secretaries currently have difficulties in differentiating their superior qualifications from those of other people in the occupation. We note in passing that neither the Law Society of Upper Canada nor the Ontario Branch of the Canadian Bar Association accepted that law firms at present face any significant difficulties in identifying and hiring appropriately qualified support personnel, or at any rate, if such difficulties exist, they did not accept that they were amenable to amelioration through any form of regulatory intervention.

¹³Royal Commission on Legal Services, *Final Report, op. cit.* at n. 8, Recommendation 21.4, p. 281. We also note that the Ontario Committee on the Healing Arts recommended that decisions to prosecute unauthorized practice be removed from professional bodies and be vested with the Crown Attorney's office. See Ontario, Committee on the Healing Arts, *Report*, Vol. 3 (Toronto: Queen's Printer, 1970), p. 42.

The form of regulatory intervention favoured by both the Institute of Law Clerks and the Metropolitan Toronto Legal Secretaries Association involved some form of certification leading to reserved title. This is seen as providing a means of promoting more rigorous and more uniform standards, especially with respect to community college programmes in the two areas. While the Legal Secretaries Association appeared to favour the establishment of a single regulatory statute providing paralegal personnel with a governing body that would dispense more than one designation, the Institute of Law Clerks wanted a separate certificate regime for themselves.

We believe that the certification system we have recommended in Chapter 13 will essentially meet the aspirations of these two groups without interfering in any way with the ability of law firms and other employers of paralegal personnel to make autonomous hiring decisions. In this context, we note that the Institute of Law Clerks of Ontario and the Metropolitan Toronto Legal Secretaries Association will each be free to apply for a designation under the proposed statute without being subject to any veto on the part of the Law Society. (The refusal of the Law Society in the past to approve such designations as “legal executive” or “legal assistant” has apparently been a source of irritation to the Institute of Law Clerks.) However, we would like to encourage both groups to continue efforts to rationalize their objectives, perhaps with a view to developing a single designation.

Another issue which was raised both in discussions with these two groups and in the Staff Study was that of bridging: in other words, under what circumstances, if any, should a duly qualified law clerk or legal secretary, on meeting prescribed additional formal educational and practical experience requirements, be admitted to the full status of a lawyer? As we emphasized in Chapter 1, we regard it important as a matter of principle that paraprofessional training tracks should not be entirely closed-ended, but rather should leave open the possibility of vertical mobility and graduation into the ranks of the relevant senior profession on satisfying appropriate additional requirements. In law, the formal community college training programmes for law clerks and legal secretaries and the evolution of organizations representing their interests probably are at too early a stage for specific bridging requirements to be contemplated.

However, in the long term, this would appear to be a matter to which paraprofessional groups, the Law Society of Upper Canada, and the Ontario Law School Deans could usefully address themselves. We emphasize that what we have in mind is not some shortcut method of entry into the legal profession. Rather, we envisage the creation of the possibility for paralegal personnel to graduate to the full status of a lawyer by demonstrating appropriate formal training as a paraprofessional, appropriate job experience, and a capacity to meet such additional formal or practical requirements as might reasonably be prescribed to ensure full equivalence in skills to those of an entering lawyer. Properly structured bridging arrangements providing readily accessible opportunities for upgrading—such as evening or late afternoon classes in formal law schools—should enable those paralegal personnel of outstanding potential to realize the full measure of their excellence. While this may mean that only a handful cross the required bridge in any time period, the returns both to themselves and to the wider public may well be significant.

D. Paraprofessionals: Community Legal Clinic Workers

In its submissions to us, the Committee of Community Legal Workers expressed concerns both about the degree of control that the Law Society of Upper Canada, through the Legal Aid Plan, has exercised over budgetary allocations to community legal service clinics, and the regulatory control exercisable by the Law Society over the allocation of tasks in community legal clinics through the unauthorized practice provisions of *The Law Society Act*. The first issue—budgetary control—was assigned by the Attorney General for investigation to a special Commission on Clinical Funding (the Grange Commission) which reported to the Minister in October, 1978.¹⁴ We therefore pursued neither the concerns of community legal workers in this area nor indeed broader issues of legal aid which were recently studied by the Osler Task Force on Legal Aid.¹⁵

As to regulatory issues, the Committee of Community Legal Workers made forceful representations to us that they should be allowed a large measure of autonomy with respect to matters such as

¹⁴Ontario, Ministry of the Attorney General, Commission on Clinical Funding, *Report* (Toronto: Ministry of the Attorney General, 1978).

¹⁵Ontario, Ministry of the Attorney General, *Report of the Task Force on Legal Aid*, Part I (Toronto: Queen's Printer, 1974).

determining the responsibility of individual community legal workers to clients, the training of community legal workers, and the degree of required supervision, if any, by lawyers in the performance of their work. We feel some force in these submissions in the sense that the environments in which community legal workers are functioning, and may function in the future, are widely varied and often specialized to very particular classes of client needs, thus making it difficult to analogize from a standard law firm environment to community legal service clinics in terms of the appropriate qualifications and configurations of professional and paraprofessional personnel.

This much said, however, the client groups serviced by these clinics are entitled to some assurance that appropriate quality control systems are in place. In this respect, the Staff Study proposed that community legal workers ought to be granted an exemption from the licensing system in law in those cases where they are employees of community legal service programmes which are financed by public funds, and that this exemption might be specified from time to time by or under *The Law Society Act*.¹⁶ The thinking behind this proposal was that widely representative public funding authorities were likely to exercise a sufficient measure of ultimate quality control. This proposal seems to have been largely overtaken by events.

Following the release of the Grange Report on Clinical Funding, new regulations under *The Legal Aid Act* have been proclaimed by the Lieutenant Governor in Council¹⁷ setting up a Clinic Funding Committee, the primary function of which is to establish policy and guidelines with respect to the funding of clinics. This Committee is composed of five members, three of whom are to be appointed by the Law Society and two of whom are to be appointed by the Attorney General. At least one of the members appointed by the Law Society and one of the members appointed by the Attorney General must have been associated with a clinic.

Importantly, in addition to its funding responsibilities, the regulations empower the Clinic Funding Committee (*inter alia*) to

¹⁶Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), Proposal 6.9, p. 180.

¹⁷Order-in-Council 226/79, May 30, 1979.

direct its staff in the development of resource and training facilities for clinics; to consult with clinics in the development of training programmes; and, where the Committee considers it advisable, to recommend funding for training programmes conducted by clinics. The terms and conditions of funding that the Committee may recommend to the Director of the Legal Aid Plan in respect of any clinic may include, but are not limited to, the following: (a) that the clinic shall be under the direction of a community Board of Directors (a potentially important quality control agent); (b) that the clinic shall employ a solicitor in the work of the clinic; and (c) that the personnel of the clinic shall be trained to a standard approved by the Committee.

While these regulations are only beginning to be implemented, the clear point of them is that a widely representative public funding authority now has explicit jurisdiction not only to deal with funding matters pertaining to community legal service clinics, but also to enforce appropriate measures of ultimate quality control. The Committee of Community Legal Workers, in their presentation to us in the public meetings, expressed satisfaction with these developments and appeared to regard them, at least at this time, as meeting all the concerns that they had previously expressed to us. Accordingly, we make no recommendations for further action in this area.

E. Notaries Public

Our terms of reference required us to review the provisions of the *Ontario Notaries Act*.¹⁸ The research we commissioned in this area discloses few significant problems in the appointment and regulation of notaries public in Ontario. The only matters of consequence appear to relate to the non-lawyer notaries, currently numbering about 552 in the province. Notaries in Ontario, in sharp contrast to their namesakes in Quebec and in many European jurisdictions, perform very limited functions pertaining to the formal certification or attestation of certain documents as prescribed by various statutes. The Provincial Examiner appointed under *The Notaries Act* has informed us that there are three principal functions performed by non-lawyer notaries. First, in the manufacturing sector, forms are often required to be completed and notarized as to the origins of imports or exports. Second, patent and trademark agents are frequently required by

¹⁸R.S.O. 1970, c. 300.

legislation here or abroad to notarize certain documents. Third, new Canadians will often require the translation of documents and the notarization of powers of attorney with regard to property left behind in their country of origin.

The Provincial Examiner noted that the most difficult policy questions arise with regard to this third class of function. He reported that his current policy in issuing new notarial commissions is to require a demonstration of a need in a community for notarial services that could not be met by existing lawyer or non-lawyer notaries. Between May of 1978 and May of 1979, apparently only two new appointments were made with respect to this third function. The major concern here, of course, is that the sharply contrasting roles performed by notaries in Ontario compared to other jurisdictions create the possibility of confusion on the part of members of the public, particularly those who have emigrated from jurisdictions where the term "notary" carries a more expansive connotation.

Thus, there is the potential for non-lawyer notaries to engage in the unauthorized practice of law to the possible prejudice of members of the public who are in receipt of these unqualified services. The Law Society has received a steady trickle of complaints about notaries on this score (37 complaints between 1974 and 1978), although the Provincial Examiner informed us that there had been only one cancellation of a notarial appointment in the eighteen months immediately prior to August, 1979 (this in relation to the criminal activities of the notary in question). We do not see what more can be done to deal with the dangers of unauthorized practice by non-lawyer notaries. The Law Society has the ability to initiate prosecutions for unauthorized practice, and the Provincial Examiner is able to cancel notarial appointments. Moreover, the much more conservative policy now in place with respect to new notarial appointments should mitigate the dangers further, without creating a scarcity of notarial services in the community. The latter does not seem a major danger given the very substantial influx of new lawyers (most of whom are also notaries) into most communities over the past ten years or so.

Apart from ensuring that the public is adequately protected against the provision of unqualified services by non-lawyer notaries, the other policy issue presented by the provisions of the present *Notaries Act* may be generally characterized as a due process issue. *The Notaries Act*, unlike the other professional statutes under review, is

quite skeletal in nature and, for example, contains nothing in the way of prescriptions for qualifications for obtaining a notarial appointment, nothing as to grounds for cancellation thereof, and nothing as to the processes to be followed in issuing or revoking an appointment, or appeals from decisions in these areas.

The Staff Study proposed that some elaboration of these matters be undertaken in revisions to *The Notaries Act*.¹⁹ However, as we pointed out in Chapter 1, these proposals elicited no reactions at all in written briefs or presentations at public meetings following the release of the Staff Study. Thus, we conclude that no practical problems of consequence have been identified with respect to the present administration of the Act, and that a more elaborate regime would involve an unwarranted expenditure of regulatory resources.

¹⁹Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 16, Proposals 5.15 and 5.16, p. 131.

Chapter 4 The Relations Between Professionals and Technical Personnel in Engineering and Architecture

The relations between professionals and technical personnel in engineering and architecture have been a source of growing concern over the past several years. Although in most respects the working relations within both engineering and architectural teams have been successfully established, there remain tensions and confusions regarding demarcation lines between professional and non-professional functions, bridging provisions to facilitate the entrance of technical personnel into professional ranks, and the certification of technicians and technologists. In this chapter, we consider these three areas in turn in each of engineering and architecture.

A. The Interface between Professionals and Technical Personnel

A.1 Engineering

The substitution of technically educated manpower for professional manpower (and vice versa) in the workplace has been for some time a major regulatory issue within the field of engineering. As the Staff Study, numerous briefs, and the public meetings have made clear, this issue has a number of important facets to which some attention must be directed in the formation of regulatory policy.

The last two decades have witnessed a marked growth in the pool of technically educated manpower in Ontario. Partly, no doubt, this has resulted from increased demand. Technological innovation and the growing complexity of professional services, along with an increase in the size of the professional services market, has tended to generate demand for skilled non-professional personnel capable of substituting for professionals in the performance of relatively routine technical tasks. On the supply side, some of the growth in the pool of technical manpower must also be attributed to public policies which have encouraged the creation of a new range of programmes of technical education in community colleges and institutes of technology.¹

¹See Theodore Marmor and William White, *Paraprofessionals and Issues of Professional Regulation*, Working Paper #16 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), p. 25 ff.

The growing population of technical personnel has been pressing with increasing vigour for greater recognition with respect to its contributions to the "engineering team." In the matter of work functions, it has been argued that the present regulatory regime in engineering inhibits the efficient use of skilled technical manpower and prevents technical personnel from operating to the limits of their knowledge and experience.² We have also heard representations to the effect that even where employers are willing to substitute technical personnel for engineers in the performance of certain tasks, they are less willing to consider technical employees for promotion to higher levels of corporate responsibility. In other words, it is argued that the present licensure regime creates career frustrations for technical employees.³

The present situation is complicated by some confusion regarding the legal effect of *The Professional Engineers Act*.⁴ Subsection (i) of section 1 of the Act defines "the practice of professional engineering" as "the doing" of one or more of a number of specified engineering activities, and section 27 effectively reserves the right to practise professional engineering to members of the Association of Professional Engineers of Ontario (APEO). It has been argued, however, that many technical employees are engaging daily in the performance of engineering functions such as those listed in subsection (i) of section 1 of the Act, often under only the most nominal supervision or direction of a licensed professional engineer. The proponents of this argument have suggested that, in the context of the workplace, the Act is as frequently honoured in the breach as in the observance.⁵

The APEO, for its part, has maintained that "inherent in the practice [of professional engineering] is the taking of professional responsibility" for the performance of engineering functions.⁶ It has initiated no prosecutions of technical employees for the unauthorized

²See Ontario Association of Certified Engineering Technicians and Technologists, Brief to the Professional Organizations Committee, October, 1977, especially p. 11.

³*Ibid.*, especially pp. 15-17.

⁴R.S.O. 1970, c. 366.

⁵Professional Organizations Committee, *Transcripts of Public Meetings with Engineering Organizations*, Presentation by the Ontario Association of Certified Engineering Technicians and Technologists, May 18, 1979, pp. 365-366 ff.

⁶Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, October, 1977, p. 28.

practice of professional engineering. It has recently issued "Guidelines for the Delegation and Supervision of Engineering Work,"⁷ the main thrust of which is that routine work based on well-established principles may be performed by non-engineers as long as they are under the adequate control of a responsible engineer, while novel work must be subject to the supervision and direction of a licensee who has accepted professional responsibility for its proper performance. The APEO's view of the Act, then, implicitly accepts the proposition that "the doing" of one or more engineering activities in the workplace by a non-licensee does not in itself constitute the unauthorized practice of professional engineering on his part, so long as a licensee assumes professional responsibility for the work performed.

Although there are different viewpoints concerning the amount of professional supervision that should be required, both professional engineers and technical personnel acknowledge that current practices entail a substantial degree of substitution between them. A number of studies of the substitution phenomenon have been undertaken, including one conducted for us by Donald Dewees, Stanley Makuch, and Alan Waterhouse, which surveyed the use of non-licensed personnel in the building design field.⁸ These studies tend to confirm that a significant amount of engineering work (as defined in the present *Professional Engineers Act*) is being performed in the workplace by technical employees, and that—especially at the senior technologist level—technical personnel frequently function with a minimum of professional intervention or supervision for an appreci-

⁷See Association of Professional Engineers of Ontario, Task Force on Delegation and Supervision, "Guidelines for the Delegation and Supervision of Engineering Work," (mimeo., 1977).

⁸Donald Dewees, Stanley Makuch, and Alan Waterhouse, *An Analysis of the Practice of Architecture and Engineering in Ontario*, Working Paper #1 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979); see also: Goodings, Sidlofsky, Goodings and Associates, *The Engineering Technologist* (a study prepared for the Ontario Ministry of Colleges and Universities, April, 1975); Goodings, *et al.*, *The Engineering Technician* (a study prepared for the Ontario Ministry of Colleges and Universities, March, 1977); Goodings *et al.*, *Study of Engineering Technologist Members of the Ontario Association of Certified Engineering Technicians and Technologists* (a study prepared for the Ontario Association of Certified Engineering Technicians and Technologists, September, 1977); Philip A. Lapp, Ltd., *Utilization of Engineering Manpower: Case Studies in Selected Areas* (a study prepared for the Association of Professional Engineers of Ontario, August, 1977); and W.F. McMullen, "An Inquiry into Substitution Between Engineers and Technologists: An Interview Study of Sixteen Firms," (a report submitted to the Committee of Presidents of Universities of Ontario for the Study of Engineering Education in Ontario 1970-80, November, 1970).

able portion of their time.⁹ For example, Dewees and his colleagues found technical personnel working at all levels of the building design team, although predominantly in the areas of detailed design, drawings, and specifications, and more rarely in the areas of conceptual design and direct client consultation. Moreover, the extent of professional supervision seems to have been as varied as the many levels of skill and experience possessed by technical personnel.¹⁰

The Staff Study has helped to identify, and the briefs and public meetings have helped to clarify, a number of characteristics which are peculiar to the field of engineering among the four professions under review. There is little indication that "second parties" (consumers of services) face serious or pervasive informational problems in the market. A very large proportion of professional engineers, and virtually all technical personnel, are employees. It appears that on the whole, employers do not lack the sophistication and information needed to assess their requirements and to identify appropriate service providers although, as the APEO has pointed out, the bulk of employer sophistication may well derive from the in-house expertise provided by engineering staff.¹¹

It is with respect to "third parties," however, that engineering arguably has the most compelling need for mechanisms which address the protection of vulnerable interests. Existing demand-side legislation and regulations, *The Construction Hoists Act*, for example,¹² address some of the instances in which the protection of the public interest requires the use of particular personnel in the performance of certain functions. Nevertheless, as numerous submissions to the Committee have pointed out, there remain areas of public concern which are not at present covered by such controls. At the same time, it is argued that given the intricacy and scope of those areas of engineering practice which may raise concerns for public safety and well-being, to

⁹Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), pp. 160-161.

¹⁰See Dewees, Makuch, and Waterhouse, *An Analysis of the Practice of Architecture and Engineering in Ontario*, *op. cit.* at n. 8, pp. 98-108 and pp. 347-348.

¹¹Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 13.

¹²R.S.O. 1970, c. 80.

rely more heavily on demand-side regulation could be cumbersome, complex, and uncertain.¹³

On the other hand, we are not unaware that disadvantages and inefficiencies can result from the imposition of excessive and rigid restrictions on the ability to do engineering work. The rapid rate of technological change which characterizes the engineering field, and the need to make efficient use of our available skilled manpower resources, require flexibility. The public investment in professional and technical education should be protected from arbitrary impediments to the full use of developed human resources. It follows that any regulatory policy should try to avoid causing unnecessarily rigid segmentation of the engineering team.

No single regulatory option can fully satisfy all of the various interests involved. For example, flexibility in the substitution of non-professional for professional manpower must give way at some point to those third party concerns which generate demand-side requirements for licensed professionals. As well, whatever policy is pursued must be amenable to implementation with a minimum of difficulty. It is necessary to avoid confusion in the minds of engineering personnel, their employers, and the public concerning the demarcation between regulated and unregulated functions.

In the Staff Study, the Research Directorate addressed the problem by tentatively proposing the institution of an "industrial exemption" which would remove from the scope of the exclusive licensure scheme all work performed within non-professional enterprises, both public and private, unless the use of professional services was required by some form of demand-side regulation.¹⁴ A similar suggestion has found expression in the recently completed report of the Committee of Inquiry into the Engineering Profession¹⁵ in the United Kingdom.

¹³Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 14; Federation of Engineering and Scientific Associations, Brief to the Professional Organizations Committee, May, 1979, pp. 3-7.

¹⁴Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 9, pp. 118-121.

¹⁵England, Committee of Inquiry into the Engineering Profession, *Engineering Our Future* (London: Her Majesty's Stationery Office, Cmnd. 7794, 1980), Chapter V, "The Organisation of Engineers."

In their briefs to the Committee and in appearances at the public meetings, individual professionals and their representative organizations were virtually unanimous in rejecting this proposal. We feel the force of some of the arguments presented against it; for instance, that an industrial exemption system would rely heavily on extensive and complex demand-side regulation to ensure adequate protection of public safety and welfare, and that it might run counter to efforts aimed at attaining nationally uniform licensing standards.

We have also been made aware that similar exemption provisions found in a large number of U.S. state registration laws have been a source of considerable controversy and friction between the profession and the enterprises which employ engineers.¹⁶ Again, we are impressed by the fact that technical employees, who would gain appreciably more freedom to practise independently in the workplace under such an exemption, have been unenthusiastic about the proposal. Meantime, commercial, industrial, and government employers of engineers and technologists who might have expressed an interest in de-regulation, did not come forward to support it.

All these considerations lead us to reject the industrial exemption in favour of alternative approaches to the problems involved in the interface between engineers and technical personnel. In particular, it is necessary to ensure that the licensing of engineering work conforms with the reality of the engineering team. This is of fundamental importance to technical personnel, but it is also clear that the APEO shares this concern; its final brief is quite explicit on the matter.

We believe that *The Professional Engineers Act* should be amended so as to clarify the responsibilities of professional engineers vis à vis the other members of the engineering team. In particular, it is important that the legislation provide that the performance of engineering work by non-licensees not be considered a violation of the Act so long as a licensed engineer is professionally responsible to the APEO for the maintenance of engineering standards in the performance of the work.

Let us illustrate what we propose in terms of possible changes in the Act. As we noted above, the Act defines the "practice of

¹⁶See the U.S. National Society of Engineering Examiners, *Position Paper on Industrial Exemption in Registration Laws for Professional Engineers* (Washington, D.C.: IM. 3/76 Corp. N.S.P.E. Pub. No. 2212, 1976).

professional engineering” in section 1, subsection (i), as “the doing” of one or more of a list of engineering activities. We would retain this definition but we would add a new subparagraph to section 1 containing the following definition:

1. In this Act, . . .

- (q) “taking professional responsibility” means being accountable to the Association for ensuring the maintenance of engineering standards in the performance of one or more of the acts specified in subparagraph (i) above.

The present section 2 ensures that the Act will not be applied so as to encompass a number of persons and functions otherwise within its scope. We would rephrase the introductory portion of section 2 to clarify the relevance of demand-side legislation and add one new subsection thereto. Thus, section 2 would read in part:

2. Subject to the requirements of any other statute or regulation, nothing in this Act shall be construed or applied so as to prevent, . . .

- (g) any person from doing one or more of the acts specified in subsection (i) of section 1 provided a professional engineer takes professional responsibility for the performance of such act or acts.

In addition, the Association of Professional Engineers of Ontario’s final brief to the Committee suggested the advisability of yet further changes to bring the legislation in line with the realities of the engineering team as it has evolved. The APEO has proposed the addition of three subsections to section 2 exempting the following:

- (h) any person from engaging in testing and inspection activities, and reporting thereon, provided that the specifications and standards involved have been prepared or approved by a professional engineer;
- (i) any person from undertaking the design of special production machinery, equipment or tools and dies for use in his employer’s facilities in the production of the employer’s products;

- (j) any person from engaging in the repair, maintenance or operation of the equipment and facilities of his employer.¹⁷

The amendments we propose would legislatively embody the view of the APEO that the essence of professional practice lies in the professional's accountability to the licensing authority for the quality and integrity of any engineering work with which he is associated, rather than in the actual performance of the work. Furthermore, they would also clearly legitimize *de facto* practices of substituting skilled technical personnel for professionals according to the professional's confidence in the skill and experience of such personnel. Non-professional personnel would be insulated from potential prosecution for unauthorized practice so long as they did not violate section 27 of the Act by engaging in engineering work in cases where a licensee had not assumed professional responsibility for such work or otherwise held themselves out to the public as entitled to carry the designation "professional engineer." Accordingly, *we recommend that:*

4.1 *The Professional Engineers Act* should be amended so as to:

- (a) provide that the performance of engineering work by persons who are not professional engineers shall not be a violation of the Act so long as a professional engineer is professionally responsible to the Association of Professional Engineers of Ontario for the maintenance of engineering standards in the performance of the work; and
- (b) stipulate that nothing in the Act shall be construed so as to prevent:
 - (i) any person from engaging in testing and inspection activities, and reporting thereon, provided that the specifications and standards involved have been prepared or approved by a professional engineer;

¹⁷Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 17.

- (ii) any person from undertaking the design of special production machinery, equipment, or tools and dies for use in his or her employer's facilities in the production of the employer's products; and
- (iii) any person from engaging in the repair, maintenance, or operation of the equipment and facilities of his or her employer.

There has been considerable anecdotal evidence suggesting that, to date, the provisions of the Act have not been vigorously enforced in cases of unauthorized practice by in-house employees, partly, no doubt, because of the current uncertainty regarding the effect of the licensing law. Inasmuch as the amended legislation would narrow and clarify the circumstances in which a charge of unauthorized practice could be sustained, proper enforcement should be facilitated. In the case of in-house engineering, it would be appropriate to place an onus on the employer to ensure compliance with the Act and to subject employers who encourage or condone the use of completely non-licensed engineering teams to a penalty. Section 27 of the present Act provides for a number of offences including the unauthorized practice of professional engineering. We would suggest an addition in the form of a new section stating that on application to the Divisional Court by the APEO, a cease and desist order may be issued by the Court against any person who knowingly retains, employs, contracts with, or otherwise engages a person other than a professional engineer for the performance of any act or acts constituting the practice of professional engineering. This provision should protect technical personnel from being manoeuvred or pressured by employers into situations where they might be seen as transgressing the unauthorized practice prohibition and provide an effective and direct way to deal with employers who attempt to sidestep *The Professional Engineers Act* or demand-side legislation. Accordingly, *we recommend that:*

4.2 *The Professional Engineers Act* should be amended so as to enable the Association of Professional Engineers of Ontario to seek from the Divisional Court a cease and desist order against any person who knowingly retains, employs, contracts with, or otherwise engages someone who is not a professional engineer for the performance of any act or acts constituting the practice of professional engineering.

In summary, we believe that our recommendations would help to achieve an appropriate balance between the interests involved. They would promote flexibility and efficiency in the allocation of manpower and would minimize the rigidities of the licensure scheme. They would address the aspirations of technical personnel to work to the limits of their demonstrated competence and would enhance certainty by laying the present *de facto* and *de jure* discrepancies to rest. Finally, they would facilitate the policing of employer evasions of legal requirements and, in general, would adequately protect the third party interests which provide the basic rationale for the existence of a form of licensure regime in the engineering field.

A.2 Architecture

The interface between professionals and technical personnel in the field of architecture is of a substantially different nature than that which obtains in engineering. The majority of engineering work is done in a context where both professional and technical personnel are employees, where the concept of the “engineering team” is well-developed, and thus where some degree of substitution between professional and technical personnel is reality rather than possibility. This reality gives rise to the interface problems we have explored above.

The situation in architecture is different. A smaller proportion of architectural work is done in an “employed” context. A larger share is provided by architectural firms on a consulting basis. Perhaps for this reason, it appears that the emergence of “teams” of professional and technical personnel has been somewhat slower in architecture than in engineering. The contentious aspects of the interface between architects and technical personnel appear to relate less to their interaction in employed contexts than to employer-employee relations in architectural firms and to the ability of technical personnel to provide services outside architectural firms. Whatever the exact circumstances, there is evidence that architectural technicians and technologists feel some of the same frustrations as do their engineering counterparts in terms of their perceived inability to make full use of their training in the course of their work and to attain positions of greater responsibility.

We are sensitive to these frustrations. Although the conditions of employment of technical personnel by architectural firms is a matter

most appropriately left to individual negotiation and the forces of the marketplace, some of the recommendations made elsewhere in this Report should serve to allow technical personnel more scope for the expression of their talents and the pursuit of their aspirations. The amendments to *The Architects Act* and to *The Professional Engineers Act* suggested in Recommendations 5.2 and 5.3 would permit architectural technologists to offer building design services for buildings exempted from the requirement of professional services without fear of prosecution for unauthorized practice. The provisions for beneficial ownership and control of architectural firms as laid out in Recommendation 8.3 at least make possible the attainment by technical personnel of positions of responsibility and authority in architectural firms. These changes in themselves might go some distance towards removing undesirable restrictions on the freedom of action and career development of technical personnel.

B. Bridging Provisions

B.1 Engineering

The “bridge” for technical personnel who wish to qualify as professional engineers is provided by the examination programme of the Association of Professional Engineers of Ontario. This programme is designed to provide a route of entry into the profession for individuals who are not graduates of approved Canadian engineering schools (a population which obviously includes a wide range of individuals in addition to technologists).

The Syllabus (or course of study and examination) for the examination programme is established by the Canadian Accreditation Board (CAB) of the Canadian Council of Professional Engineers, in consultation with the ten provincial engineering associations. The CAB’s major function is to accredit engineering courses in Canadian engineering schools; and in establishing the Syllabus of Examinations, it attempts to ensure that engineering training provided through the examination programme is equivalent to that provided through universities. Accordingly, the Syllabus is periodically revised as the content of engineering courses in universities changes. The most recent revision occurred in 1978/79; changes made at that time resulted

in an increase, from twenty to twenty-five, in the number of examinations to be passed by applicants with no post-secondary credits.

The APEO, like the other provincial engineering associations, has adopted the national Syllabus. The APEO's Board of Examiners administers the Syllabus in Ontario. As part of this function, it determines on a case-by-case basis the number of examinations from which an applicant may be granted exemption on the basis of previous training. As of 1973, the APEO accepted qualification as an engineering technologist as the minimum requirement to sit its examinations. Qualification as an engineering technologist is taken to mean graduation from a three-year engineering technology programme in Canada, or certification as an engineering technologist by the Ontario Association of Certified Engineering Technicians and Technologists (OACETT) or one of its sister provincial associations. Candidates successful at the APEO's examinations must also demonstrate six years of experience in engineering work which is satisfactory to the Council before being licensed. University graduates may be exempted from as much as four years of this experience requirement.

Until April, 1979, the holder of a three-year engineering technology diploma from a community college might have been required to write all or most of the APEO examinations, depending on the technology programme. As of April, 1979, the Board of Examiners has limited the number of examinations which may be assigned to technology diploma holders to a maximum of eighteen. It is expected that Bachelor of Technology graduates from Ryerson Polytechnical Institute will be assigned no more than twelve. In addition, any applicant may apply to the APEO's Appeal Board for exemption from one or more examinations on the basis of particular engineering experience.

The APEO estimates, on the basis of a sampling of the files of 300 of the 2,500 candidates at present in its examination system, that "about eleven per cent are graduates of Ryerson or other three-year engineering technology programmes in Canada, with a further two per cent being certified as certified engineering technologists. The majority, almost 87 per cent, of examination candidates are either immigrants possessing a wide range of academic and experience qualifications, often impossible to verify, or graduates of other

university programmes who wish to become registered professional engineers.”¹⁸

In addition to the APEO examination system, another form of “bridge” between engineering technology and professional engineering exists at Lakehead University. Lakehead offers a degree programme in engineering, admission to which is open only to graduates of three-year programmes in engineering technology at Lakehead, Ryerson Polytechnical Institute, and community colleges. This degree programme comprises two academic years, plus one eight-week summer session and is approved by the CAB.

On the whole, we are favourably impressed with the APEO's bridging provisions. They appear to be flexible, allowing for individual career histories, including both education and experience, to be taken into account. We have heard no criticism regarding the awarding of credit for past engineering experience. There does, however, appear to be some contention between OACETT and the APEO regarding the recognition of academic training in engineering technology.

The contention focuses upon the number of examinations required of engineering technology graduates who wish to follow the APEO examination programme, and upon the process whereby these requirements are established. OACETT reported to us that the 1978/79 changes in the APEO Syllabus of Examinations constituted a virtual doubling of the number of examinations required of technologists. OACETT also noted that it was neither consulted nor informed about these changes.¹⁹ The lack of communication between OACETT and

¹⁸Letter from Mr. A.C. Cagney, Executive Director of the Association of Professional Engineers of Ontario, to the Professional Organizations Committee, July 11, 1979, pp. 3-4. Our description of the APEO examination programme is largely drawn from this letter and from the statements of Mr. J.E. Benson, President of the Association of Professional Engineers of Ontario, to the Professional Organizations Committee, in *Transcripts of Public Meetings with Engineering Organizations*, Open Question Period, May 18, 1979, pp. 464-472.

¹⁹Ontario Association of Certified Engineering Technicians and Technologists, Brief to the Professional Organizations Committee, April, 1979, p. 73. A spokesman for the Association of Professional Engineers of Ontario has also noted that OACETT was not consulted or informed about these changes. See Professional Organizations Committee, *Transcripts of Public Meetings with Engineering Organizations*, Open Question Period, May 18, 1979, pp. 461-463.

the APEO on this issue appears to us unfortunate. Fuller communication would not only ensure that the interests of engineering technologists are explicitly taken into account in the establishment of the Syllabus and the policies regarding exemptions from examinations but would also help to ensure that the implications of these provisions are fully and widely understood.

Such communication would seem to be best fostered by involving engineering technologists at two stages of policy-making: in the consultations between the APEO and the Canadian Accreditation Board regarding the content of the Syllabus, and at the level of the APEO Board of Examiners where policies regarding exemptions are established. Accordingly, *we recommend that:*

- 4.3 The Association of Professional Engineers of Ontario (APEO) and the Ontario Association of Certified Engineering Technicians and Technologists (OACETT) should establish effective consultative mechanisms whereby representatives of OACETT may be involved in the consultations between the APEO and the Canadian Accreditation Board regarding the content of the Syllabus of Examinations, and whereby representatives of OACETT may be consulted by the APEO Board of Examiners in establishing the policies to be applied in exempting engineering technologists from certain APEO examinations.**

B.2 Architecture

The mechanism whereby technical personnel may qualify as professional architects is provided by what has been termed the "apprenticeship" route to professional registration. This route has been designed to provide for "individual private study under the auspices of the profession and the passage of professional qualifying examinations . . . combined with continuous or continuing practical experience."²⁰ Some provision for such a qualification route has existed throughout the history of the architectural licensing system in Ontario.

²⁰Professional Organizations Committee, *Transcripts of Public Meetings with Interested Individuals*, Presentation by Mr. Michael Barstow, Chairman of the Royal Architectural Institute of Canada's Certification Board, June 19, 1979, pp. 2,032-2,033. We are indebted to Mr. Barstow for his elucidation of the RAIC Syllabus Programme as it is administered in Ontario and have drawn heavily upon his submissions in this section.

Currently, the study and examination components of the apprenticeship programme are set out in the Syllabus of the Royal Architectural Institute of Canada (RAIC); this document was extensively revised in 1977. The Ontario Association of Architects (OAA) recognizes completion of the RAIC Syllabus as fulfilling the academic requirements for licensure when the Syllabus Programme is pursued in parallel with full-time practical experience.

The RAIC Syllabus comprises twenty-two courses of study and examination in nine stages. As in the case of engineering, candidates are expected to prepare for examinations primarily through home study, although certain courses offered through secondary and post-secondary institutions may aid in such preparation, and correspondence with RAIC examiners for further aid in preparation is possible at the initiative of the candidate.

Following completion of the Syllabus, a candidate for licensure in Ontario is required (as is a university graduate in architecture) to complete the registration course administered by the OAA's Registration Board and to pass the Board's examinations. Furthermore, a candidate for licensure must fulfill the three-year experience requirements.

Provisions exist for the exemption of a candidate from certain qualifying requirements in recognition of his past training or experience. The Syllabus Director of the RAIC Programme may grant credits to Ontario candidates in the Programme on the advice of a Syllabus Advisory Committee in Ontario.²¹ Exemptions are granted largely on a case-by-case basis, but certain general policies have been developed with respect to particular categories of candidates.

Graduates of Ryerson's four-year Bachelor of Technology programme with an architectural major, for example, are likely to be required to complete five subjects in the RAIC Syllabus and may also be required to write only the examinations in three other courses.²²

²¹The Syllabus Advisory Committee is appointed by the RAIC Certification Board, with the endorsement of the OAA Registration Board. Mr. Barstow reports that "as the Syllabus moves progressively into full self-administration it is expected that the selection and appointment of the Advisory Committee will be relinquished by the OAA Registration Board and taken over by the Syllabus organization." Letter from Mr. Michael Barstow, Chairman of the RAIC Certification Board, to the Professional Organizations Committee, August 8, 1979, p. 1.

²²*Ibid.*, p. 4.

Indeed, the Ryerson programme may well become a notable alternative to architectural schools as a route to professional qualification. Approximately one-third of the thirty-six candidates in the Syllabus Programme in Ontario as of December, 1979 are Ryerson B. Tech. graduates, and it has been estimated that, in the future, one-third to one-half of the graduates of that programme will continue into the RAIC Syllabus Programme.²³

The extent to which architectural *experience* (as opposed to academic training) may be recognized by professional bodies as justifying exemptions from examination or experience requirements for licensure is more difficult for us to ascertain. The employment histories of individuals vary even more widely than do their academic qualifications, and it is unlikely that general guidelines can or will be enunciated. Furthermore, the limited experience with the 1977 Syllabus Programme makes it difficult to assess the practice in this area to date. The Chairman of the RAIC Certification Board has informed us that "there is ample room, within the Syllabus system, for substituting *appropriate* experience for formal academic preparation, provided that the experience is indeed a qualitative substitute."²⁴

As for crediting experience gained while in the Syllabus Programme towards meeting the experience requirements for licensure, the same individual noted that "while it is true that there has as yet been no experience in Ontario with this Programme, in earlier years when the OAA Registration Board conducted its own qualifying course and examinations, . . . upon completion of the examination, all further experience requirements were waived, and the candidate was immediately eligible for registration. There is no reason to suppose that the Registration Board would not grant very substantial credit for experience to Syllabus graduates in Ontario."²⁵

On the other hand, the Association of Architectural Technologists of Ontario (AATO) contends that while "the RAIC does recognize education, . . . it does not recognize in any way practical work

²³Professional Organizations Committee telephone interview with Mr. Michael Barstow, December 5, 1979.

²⁴Mr. Michael Barstow, Chairman of the RAIC Certification Board, Brief to the Professional Organizations Committee, March, 1979, p. 3. Emphasis in original.

²⁵*Idem*.

experience to our knowledge. That is a bone of contention.”²⁶ The basis for this judgement appears to be the personal experience of certain AATO members. Again, as in the case of engineering, there appears to have been no formal communication between AATO and the OAA or the RAIC regarding bridging provisions.²⁷ A liaison committee between the OAA and the AATO has been dormant.

We are concerned that there be consultative mechanisms whereby the interests of technologists can be expressed at the stage at which bridging provisions are designed and administered, and whereby the provisions themselves can be fully and widely understood by technologists. There is a need to involve technical personnel at two stages of policy-making: in this case, regarding the design of the Programme by the RAIC and the granting of exemptions by the Ontario Syllabus Advisory Committee and the RAIC Syllabus Director. Accordingly, *we recommend that:*

- 4.4 The Ontario Association of Architects (OAA) and the Association of Architectural Technologists of Ontario (AATO) should establish effective consultative mechanisms whereby AATO representatives may be involved in the consultations between the OAA and the Royal Architectural Institute of Canada (RAIC) regarding the design of the RAIC Syllabus Programme, and whereby AATO representatives may be consulted by the Ontario Syllabus Advisory Committee with respect to the policies to be applied in advising the RAIC Syllabus Director regarding the exemption of architectural technologists from certain Syllabus requirements.

C. Certification of Technical Personnel in Engineering and Architecture

It remains finally to consider the question of the certification of technical personnel in engineering and architecture. Given the

²⁶Professional Organizations Committee, *Transcripts of Public Meetings with Architectural Organizations*, Presentation by the Association of Architectural Technologists of Ontario, June 5, 1979, p. 1,025.

²⁷There appear, however, to have been efforts on the part of individual OAA and AATO members to bridge this communication gap. Professional Organizations Committee, *Transcripts of Public Meetings with Interested Individuals*, Presentation by Mr. Michael Barstow, *op. cit.* at n. 20, pp. 2,060-2,062.

considerable variation in the standards of diploma programmes in engineering and architectural technology, the Ontario Association of Certified Engineering Technicians and Technologists and the Association of Architectural Technologists of Ontario can provide a useful function in “screening” graduates of such programmes and establishing uniform quality standards. Each has a number of categories of membership, each category involving a different standard of qualification. OACETT maintains the following categories of membership:

- (a) Engineering technologist: graduates of three-year community college courses in engineering technology or the equivalent as assessed by OACETT;
- (b) Senior engineering technician: a category of membership offered prior to 1976 to members possessing qualifications intermediate between technician and technologist status;
- (c) Engineering technician: graduates of two-year engineering technology courses in community colleges or the equivalent as assessed by OACETT;²⁸
- (d) Associate member: members whose academic qualifications, or work experience, or both, do not fulfill the above requirements; and
- (e) In-training member: students proceeding to full membership.

The first three of these categories of members are entitled to designate their work with the mark C.E.T. (or CET) which is registered federally as a trademark indicating “the services of technicians and technologists in the engineering field.”²⁹ This seems a rather tortuous attempt to protect a designation; and indeed the designations “Certified Engineering Technologist” and “Certified Engineering Technician” are not well protected in law. They have, at present, no statutory base; and as the Staff Study noted, the common law offers little protection against the “unauthorized” use of such designations or against competing designations.³⁰

²⁸The first three categories of membership must possess two years “contemporary” experience consistent with the level of designation.

²⁹Ontario Association of Certified Engineering Technicians and Technologists, Brief to the Professional Organizations Committee, April, 1979, p. 70.

³⁰Trebilcock, Tuohy, and Wolfson, *Professional Regulation, op. cit.* at n. 9, p. 139.

The recommendations we have made in Chapter 13 have implications for OACETT in this respect. In order to continue to designate its members as “Certified Engineering Technologists” and “Certified Engineering Technicians” (as opposed to allowing them to mark their work as “C.E.T.”), OACETT would be obliged to apply for the registration of such designations under the proposed “Professional Designations Act.” It would be further obliged to comply with the requirements of that Act as to its capacity to prescribe, enforce, and maintain qualification requirements, a code of ethics, a complaints procedure, and a disciplinary mechanism.

The proposed “Professional Designations Act” would require that a designation registered thereunder not be confusingly similar to another designation registered under that or any other act. If it were to continue to distinguish between technologists and technicians in its certification process, then, OACETT might well be required to award designations whose abbreviations were not identical.

Such a procedure would afford OACETT a greater protection of its designations against unauthorized use than currently exists. It might also constitute a less ambiguous signal to employers than does the present “C.E.T.” mark which may be used by both technologists and technicians.

As with any other certifying organization, however, this signal would remain unambiguous only as long as the variety of designations awarded by OACETT is very small. To avoid confusion, and to avoid balkanization of the engineering team, we would caution that the awarding of more than one designation is justified only where a strong case can be made that the additional designation conveys needed information and not simply “noise.”

Membership in the Association of Architectural Technologists of Ontario (designated as “M.A.A.T.O.”) falls into technologist, technician, building technologist, and student categories. The qualifications for technologists and technicians are as follows:

- (a) Technologist: (i) graduation from an approved educational institution as an “Architectural Technologist” or approved equivalent (this category also includes graduates of the four-year B. Tech. programme at Ryerson Polytechnical Insti-

- tute); and (ii) three years Canadian experience in architectural technology with a minimum of one of those years under the direction of an architect;
- (b) Technician: (i) graduation from an approved educational institution as an "Architectural Technician" or approved equivalent; and (ii) two years Canadian experience in architectural technology with a minimum of one of those years under the direction of an architect; and
- (c) Building Technologist: (i) graduation from an approved three-year Architectural Technology programme at an accredited educational institution in Ontario or equivalent education in the opinion of the Certification Board; and (ii) a minimum of three years Canadian experience in the major executional aspects of the building industry.

By offering only the "M.A.A.T.O." designation, AATO would not attract the provisions of the proposed "Professional Designations Act." Should it choose to offer a certification involving the terminology stipulated in that Act, however, it would be required to register any such designations and to comply with the terms of the Act.

The evolution of a variety of technical personnel in professional areas is a general phenomenon and one which can be expected to continue.³¹ In our view, our recommendations in Chapter 13, relating to the proposed "Professional Designations Act" and associated administrative provisions, offer an appropriate framework for public policy responses to these groups as they emerge.

³¹See, for example, Marmor and White, *Paraprofessionals and Issues of Professional Regulation*, *op. cit.* at n. 1.

Chapter 5 The Interface Between Architecture and Engineering

When the legally sanctioned scope of practice of two licensed professions becomes hotly disputed, it spells trouble. The trouble caused in Ontario for at least a decade by the scope of practice dispute between architects and engineers proved sufficient to earn this issue specific mention in our terms of reference. Our quest for a resolution continued past our self-imposed initial deadline for the completion of this Report and indeed emerged literally as the 1970's were giving way to the 1980's. This chapter offers what we at last conclude is a fair and feasible solution.

A. The Scope of Practice Dispute

Between 1969 and 1976, legal action was taken by the Ontario Association of Architects (OAA) against five engineering firms for offering architectural services.¹ The laying of charges was motivated by a desire on the part of the Association to obtain from the courts clarification of the scope of licensed practice laid down by *The Architects Act* and *The Professional Engineers Act*.² The essential thrust of the resulting judicial opinions was to the effect that the existing legislation sanctioned an overlapping in the functions of architects and engineers in the field of building design. While the legislation did not permit an engineer to hold himself out as an architect, it left the client free to determine whether he should hire an architect or an engineer or both. These opinions, of course, were conclusive only with respect to the facts before the courts in each case. Strictly speaking, they extended only to the design of steel, concrete, and reinforced concrete structures. In other words, it apparently remained illegal for an engineer to design any building made out of wood, masonry, or a host of other building materials. But nothing stood in the way of further court tests which, whatever

¹*R. v. Moll* (1973), 4 O.R. (2d) 119; 18 C.C.C. (2d) 210 (Co. Ct.) [1955] O.W.N. 705; *R. ex. rel. Parks v. B.H. Martin Consultants, Limited*, 14 O.R. (2d) 399 (D.C.); *R. v. Greer Galloway & Associates, Limited* (1976), 11 O.R. (2d) 280 (Prov. Ct.); *R. v. Inducon Consultants of Canada, Limited* [unreported, Prov. Ct. (Crim. Div.), September 21, 1975, Prov. Ct. Judge R.E. Bogusky]; *R. v. I & P Engineering* (action withdrawn).

²Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, p. 28.

their outcome, promised to contribute little to the constructive evolution of interprofessional relations in building design.

From the time we began our work, the Ontario Association of Architects made it abundantly clear that the architectural profession was thoroughly dissatisfied with the situation. The court tests of the existing legislation forecast the possibility that over 45,000 engineers might effectively become licensed to “practise architecture” alongside the less than 2,000 registered architects in the province. This would ignore basic differences between architects and engineers in their education, training, and experience. Furthermore, in a setting where most engineers have little competence (and less interest) in building design, it would offer the rather untenable suggestion that chemical engineers, metallurgical engineers, and the like were legislatively qualified to design buildings.

On the other side, however, it could be said that the thrust of judicial opinion interpreted the legislation in a manner that respected client choice. Most clients are relatively sophisticated purchasers of building design services; many employ in-house staff to advise them on these matters. Furthermore, technological change and interdependence have propelled the field of building design beyond the point where any given practitioner can lay claim to being a “master builder.” The external experts we commissioned, Professors Donald Dewees, Stanley Makuch, and Alan Waterhouse, argued cogently in *An Analysis of the Practice of Architecture and Engineering in Ontario* that the meshing of a variety of specialized and technically advanced skills had become essential in most projects.³ What might be emerging was a new building design profession that ignored the classic boundaries between architecture and engineering.

In this setting, much might hinge on practitioner self-discipline, based on professional codes of ethics, to ensure that no architect or engineer would venture beyond his competence in the field of building design. Reliance on such discipline, however, could constitute a more serious challenge in engineering than in architecture, given the size and diversity of the engineering profession. In

³Donald Dewees, Stanley Makuch, and Alan Waterhouse, *An Analysis of the Practice of Architecture and Engineering in Ontario*, Working Paper #1 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), pp. 20-28.

making its own highly constructive contribution to the resolution of the scope of practice dispute, the Staff Study proposed that consideration be given to creating a new group of "Licensed Building Engineers" within the rubric of the specialty system of the Association of Professional Engineers of Ontario (APEO).⁴ Engineers so licensed would be authorized to engage in practice that would be completely parallel to that of architects. The result would be the total elimination of any jurisdictional distinction between licensed building engineers and architects and a complete separation between the scope of practice of these two groups and all other professional engineers. Within the field of licensed building design, the monitoring of practitioner self-discipline would become more manageable. In addition, a degree of interlocking membership, by placing architects on the Licensing Board for building engineers and licensed building engineers on the Registration Board of the Ontario Association of Architects, would constitute tangible recognition of the need for cooperation between overlapping professions.

On its face, the Staff Study proposal was impressive. Its implementation, however, hinged very considerably on the goodwill of the two professions and in particular, on the capacity and willingness of the APEO to become, so to speak, a licensing organization within a licensing organization. Only professional expertise would be able to determine which engineers would be admitted to licensed building practice and which would be left outside the fold. The future admission to licensed practice of newly trained building engineers would likely necessitate the development of new training programmes and specialized work experiences. In brief, implementation would place a considerable burden on whatever members of the engineering or architectural professions were called upon to preside over the birth of a new licensed occupation.

As we listened to the representations made to us by the OAA and the APEO at our public meetings in May and June of 1979, we retained a favourable view of the Staff Study proposal. Should a more promising alternative fail to emerge, this proposal might well have the makings, in the APEO's own words, "of a possible imposed

⁴Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), pp. 104-115.

resolution.”⁵ Meantime, however, we were not unimpressed by the criticisms that were advanced. The “Licensed Building Engineer,” by creating a profession within a profession in Ontario, might undesirably reduce the mobility of professional engineers in Canada. There would be an undoubted cost in regulatory resources. More troublesome yet, there could be no assurance that what was currently a scope of practice dispute between architects and engineers might not simply be shifted into a scope of practice dispute that pitted architects and licensed building engineers against other professional engineers. For example, could a licensed role in building design be granted to a “building engineer” and yet denied to a “process engineer”? To shift a line of demarcation does not automatically dispel the difficulties of divided jurisdiction. Far more important than drawing any particular dividing line is substituting an atmosphere of cooperation for one of conflict.

Much of what was submitted in the course of the public meetings indicated that the parties remained far apart. Thus, for instance, the possibility of an architectural monopoly over the function of prime consultant was hotly disputed by the engineers. At the same time, however, the spokesmen for architecture and engineering were always quick to point out that professional relations in the workplace remained cordial and that indeed their Associations, despite the legal actions, had never suspended joint efforts to pursue a resolution. Perhaps the most promising path towards reconciliation might lie in recognizing that modern technology requires the participation of both architects and engineers in most kinds of building design. But, as we ourselves were quick to ask, at what point might legal recognition of this fact sanction professional featherbedding?

On June 6, 1979, the last day of our public meetings with the engineering and architectural organizations, the APEO responded positively to an initiative from the OAA that representatives of the two bodies should attempt to resolve their differences with the aid of our good offices. Our own position was to offer encouragement, but not without certain stipulations. First, only the Attorney General, as the author of our terms of reference, could determine whether this request should be granted. Second, it must be clearly understood that

⁵Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 23.

we would be able to withdraw our good offices at any time should negotiations either stall or take a direction that we might deem contrary to broader public interests. Third, we must reserve our rationale for supporting or rejecting any outcome to the actual writing of our Report. Fourth, the parties must approach their negotiations in a manner that would respect the sensitivities we had already expressed at the public meetings, particularly on the subject of professional featherbedding.

The APEO and the OAA thereupon submitted a formal joint request to the Attorney General. He responded affirmatively by letter dated June 12, 1979. The text of this letter, which appears as Appendix H at the end of this Report, covered our concerns and properly reserved the Government's own stance, whatever the outcome. At this juncture, our position as a Committee was that, at the cost of some delay in preparing our Report, we had purchased the chance that a fair and feasible solution might emerge.

B. The Agreement Between the Representatives of the OAA and the Representatives of the APEO

Our basic approach to the negotiations between the OAA and the APEO was to place the burden of working out a resolution squarely on the shoulders of the representatives of the two organizations. We ourselves met with the two sides on four occasions: August 1, October 10, October 27, and December 20, 1979. At these meetings, our basic function was alternatively one of cautioning, encouraging, and ensuring that we and each of the two parties understood what was happening. In preparation for these meetings, the representatives of the two sides devoted countless hours to reviewing their positions and conducting face-to-face negotiations. By the end of October, what we considered to be some remarkable breakthroughs had been achieved. What remained were issues of specificity to which we attached great importance, as their resolution would enable us to gauge whether the outcome was one that we could support in principle and towards which we could subsequently formulate concrete recommendations. The following are the points on which the representatives of the Ontario Association of Architects and the representatives of the Association of Professional Engineers of Ontario reached agreement for the purpose of making their joint and final presentation to the Professional Organizations Committee, on December 20, 1979, on the hitherto disputed scope of practice in architecture and engineering in Ontario.

Principle Governing the Practice of Engineering and Architecture

1. Engineers should confine their professional activity to the practice of engineering, architects to the practice of architecture.

Principle Governing the Choice of Prime Consultant

2. A client should be free to select the prime consultant of his choice.

Definition of Buildings

3. Legislation will define two categories of buildings for which any architectural services provided by an engineer shall be deemed to be incidental and ancillary to the practice of engineering. These are:
 - (a) industrial buildings such as factories, warehouses, and process plants;
 - (b) mixed occupancy buildings, where the major occupancy is as in (a) above, and where the minor occupancy does not exceed 4,000 square feet of gross floor area.
4. Buildings other than those covered by point No. 3 above will require the services of architects and engineers, unless they are:
 - (a) small buildings whose design does not require, by law, any professional services;
 - (b) residential buildings not exceeding three storeys in height which may be designed by an architect without requiring the services of an engineer.
5. Where buildings require the services of architects and engineers:
 - (a) architects will be required to provide any architectural services other than those which are necessarily incidental and ancillary to the engineering work;
 - (b) engineers will be required to provide any engineering services other than those which are necessarily incidental and ancillary to the architectural work.

Nothing in paragraphs (a) and (b) above shall be deemed to prevent an architect or engineer from showing on his drawings the engineering or architectural design aspects necessary for coordination purposes.

6.
 - (a) The engineer's entitlement to provide incidental and ancillary architectural services would in no event permit an engineer to perform all architectural services in connection with a building requiring the services of both professions.
 - (b) The architect's entitlement to provide incidental and ancillary engineering services would in no event permit an architect to perform all engineering services in connection with a building requiring the services of both professions.
7. The administrative provision of the Ontario Building Code which stipulates the buildings that shall be designed by an architect or a professional engineer or a combination of both shall be extended to provide that the drawings for such buildings shall be signed and sealed by a person who purports to be an architect or a professional engineer.

Certificates of Authorization

8. The APEO will re-structure its Certificates of Authorization in such a manner that firms whose main business is the offering of professional engineering services to the public will hold Class A Certificates of Authorization.
9. The OAA will receive legislative authority to issue Certificates of Authorization to architectural firms that offer architectural services to the public.

The Practice of Engineering and Architecture by Architectural Firms

10. An architectural firm that holds a Certificate of Authorization from the OAA shall be entitled as of right to a Class A Certificate of Authorization from the APEO provided that it employs on a full-time basis one or more professional engineers who shall take responsibility for the engineering work.

The Practice of Engineering and Architecture by Jointly Owned Firms

11. A partnership or corporation wholly owned by engineers and architects who respectively are members of the APEO and the OAA and that has received either a Class A Certificate of Authorization from the APEO or a Certificate of Authorization from the OAA shall be entitled as of right to a Certificate of Authorization issued by the other of these two organizations. Such jointly owned firms will apply in the first instance to the APEO if their main business is the

provision of engineering services, and to the OAA if their main business is the provision of architectural services.

The Practice of Engineering and Architecture by Engineering Firms

12. An engineering firm that holds a Class A Certificate of Authorization from the APEO shall be entitled as of right to a Certificate of Authorization from the OAA, provided that it employs on a full-time basis one or more architects who shall take professional responsibility for the architectural work, and is:
 - (a) a proprietorship or partnership of engineers;
 - (b) a corporation owned solely by engineers;
 - (c) a corporation in which majority ownership is held by engineers or by architects and engineers, and minority ownership is in the hands of people who are *bona fide* full-time employees of the firm;
 it being understood that the “engineers” and “architects” referred to above are members of the APEO or members of the OAA.
13. An engineering firm, including a partnership of corporations, that holds a Class A Certificate of Authorization from the APEO and wishes to offer architectural services, but that is not among the firms included in point No. 12 above, must apply for a Certificate of Authorization from the OAA through the Joint Practice Board.

The Joint Practice Board

14. There shall be a Joint Practice Board authorized to make recommendations to the OAA and the APEO. The Board will be composed of three architects and three engineers appointed by the OAA and the APEO respectively. The Chairman will be appointed by the Attorney General after consultation with the two professions. Each member of the Joint Practice Board, except the Chairman, will have one vote, and the Chairman will vote in the case of a tie.
15. The Joint Practice Board shall be created for an initial period of two years.
16. The terms of reference of the Joint Practice Board shall include:

- (a) assessing applications from any firm that holds a Class A Certificate of Authorization from the APEO and is covered by point of agreement No. 13;
 - (b) handling complaints of an interprofessional nature from members of either Association or persons other than members, relative to building design practice in cases where these complaints could not be resolved by the Associations jointly or severally. Such complaints would be made in the first instance by members to their own Association which would be expected to consider their validity prior to referring them to the Board;
 - (c) working on other matters of interprofessional relations including, for example, the coordination and publication of guidelines, standards, criteria, and performance standards in the field of building design and construction, formulated jointly by the Associations;
 - (d) recommending the grandfathering into the OAA of certain engineers who have historically provided architectural services, and who have applied within one year of the constitution of the Joint Practice Board or within such further period exceeding one year as the Board may permit; and the grandfathering into the APEO of certain architects who have historically provided engineering services and who have applied on the same terms.
17. In exercising its responsibilities pursuant to point No. 16(a), the considerations that the Joint Practice Board shall take into account in deciding whether or not to recommend to the OAA that a Certificate of Authorization be issued shall include the following:
- (a) the presence of any ownership interests in the firm that could give rise to conflicts with the professional responsibilities of the firm;
 - (b) the reason(s) why the share ownership and/or control is in the hands of other than members of the APEO and/or the OAA;
 - (c) the reason(s) why the share ownership and/or control is in the hands of other than full-time *bona fide* employees of the firm;

- (d) assurance that certification of the firm would not give rise to unauthorized practice or otherwise lead to circumvention of *The Architects Act*;
- (e) the nationality and residence of the non-professional owners; that is, owners other than members of the OAA and/or the APEO.

In assessing the merits of the applicant in relation to the above or any other considerations, the overriding criterion shall be that the Joint Practice Board is satisfied that no significant detriment to the public would result from the applicant's acceptance as an authorized firm.⁶

C. The Merits of the Agreement

The agreement reached by the representatives of the OAA and the APEO opens with two declarations of principle. The first is that engineers should confine their professional activity to the practice of engineering and architects to the practice of architecture. The second is that a client should be free to select the prime consultant of his choice.

The abundant merits of the second of these two declarations are easily discerned. The function of prime consultant has never been defined by legislation in Ontario. It appears that over the years clients have freely exercised their choice in selecting prime consultants. While clients have normally chosen either an architectural or an engineering firm, they have not been restricted to firms representing either of these professions and apparently have selected other kinds of firms (e.g., management consulting firms) on occasion. We applaud the recognition that the agreement explicitly extends to this freedom of choice. The agreement thereby lays to rest the claims and counterclaims that the architectural and engineering professions have made with respect to a monopoly over prime consultancy. It also obviates any need for a legislative definition of prime consultancy, a vexing and perhaps impossible task. Finally, it sanctions open competition for the prime consultancy business of clients who are almost invariably knowledgeable consumers of professional design services.

The first of the two declarations of principle, namely, that engineers should confine themselves to the practice of engineering

⁶"OAA-APEO Joint Agreement," (mimeo., January, 1980). Text reproduced *verbatim*.

and architects to the practice of architecture, is more complex in its ramifications. But it is by opting for this condition that the representatives of the APEO and the OAA were able to resolve the scope of practice dispute, at least to their satisfaction. Points No. 3 through 17 of their agreement provide the setting in which this condition is to be made workable. These points do so by: (a) attempting to define buildings; (b) outlining the circumstances under which professional firms can qualify for Certificates of Authorization to offer and perform engineering services, architectural services, or both; and (c) proposing the creation of a Joint Practice Board to deal with certain outstanding professional issues.

For ourselves as a Committee, the essential question is the following: Can we endorse the basic condition that has been advanced to resolve the scope of practice dispute as it is supported by points No. 3 through 17 of the agreement? We are extremely pleased to state without reservation that our answer to this question is affirmative. When all is said and done, we endorse the agreement for the following reason: as supported by points No. 3 through 17, the basic condition that engineers shall restrict themselves to engineering and architects to architecture can be met through the *employment* of the relevant professional by either an architectural, an engineering, or a mixed firm. It is upon this employment feature that our fundamental support of the agreement rests.

The agreement respects the extent to which architects and engineers do differ in education, experience, and outlook, but does so by acknowledging that technological change runs counter to splendid isolation and demands instead that these differences be harnessed through a team approach to most kinds of building design. Both client (second party) and broader third party interests stand to benefit from the team approach that the employment feature of the agreement brings within the reach of any professional design firm. Such a firm, even if owned entirely by architects or engineers, can legally compete in the entire market for design services provided it employs members of the appropriate profession. The agreement thereby enhances the potential for competition in the building design field.

The context of enhanced competition in which engineers shall do engineering, and architects shall do architecture, provides powerful insurance against the danger of professional featherbedding. In this competitive context, the incentive of any firm will be to provide the

appropriate *mix* of professionals rather than add unnecessarily to their numbers. Furthermore, competition promises to assume the healthiest of forms because firms will have every incentive to assemble professional teams that represent the blend of professional skills appropriate to the job at hand. Not only second party but third party interests stand to benefit from the potential gains in aesthetic, workable, and safe surroundings.

From the standpoint of implementation, the agreement lays to rest what we long considered to be one of the most worrisome aspects of the scope of practice dispute between architecture and engineering, namely, the prospect of continued and possibly enhanced efforts on the part of architectural firms and engineering firms to carve up, by legal means, the market for design services in Ontario. This prospect appalled us because it flew in the face of the reality of technological interdependence and of the desirability of client choice. We could not see how any legal division of jurisdiction between architecture and engineering could be sustained in the light of these imperatives. Given the employment feature of the agreement, however, we view the building definitions it contains in order to outline the permissible scope of practice of engineers and architects in a completely different light. They provide criteria for the deployment of professional skills within firms. They do not restrict a given firm to any particular kind of building design. Accordingly, the definitions are not exposed to the pressures that would otherwise threaten to turn them into targets for continuous legal action.

In yet another context, the agreement has highly positive implications for the structure of professional design firms. Quite aside from its implications for the employment mix within architectural and engineering firms, the agreement promises to increase the number of firms with truly mixed ownership. These will be not simply firms owned by architectural and engineering professionals, but firms in which employees, including allied professionals and technical personnel, have access to ownership. In this connection, we appreciate the extent to which the representatives of the OAA in particular assumed a flexible approach to firm structure as the negotiations proceeded. In Chapter 8 of this Report, we have outlined the reasons why we consider that a permissive approach to professional incorporation and the ownership of professional firms is desirable in principle.

There remain certain firms with the capacity to provide design services whose structure, in that it involves certain kinds of non-professional ownership, is such that they will not automatically be permitted to offer architectural as well as engineering services under the terms of the agreement. Such firms are to apply in the first instance to the proposed Joint Practice Board if they wish to offer architectural services. The agreed-upon terms of reference of this Board satisfy us that high priority will be attached to the consideration of such applications. In that we expect that the momentum of interprofessional cooperation that gave birth to the agreement will be carried over into the operation of the Joint Practice Board, we are confident that the applications will be handled with the utmost respect for the interests of the public. If events should prove that these expectations were excessive, we note that the agreement itself provides a safeguard in stipulating that the initial existence of the Board will be limited to two years.

It is for all the reasons outlined above that we heartily endorse the merits of the agreement reached between the representatives of the OAA and the representatives of the APEO. We consider the details of this agreement to be worthy of implementation. Before turning to the task of formulating recommendations to this effect, however, we must, as a matter of our own responsibility, address the question of what category of buildings should remain legally exempt from a mandatory requirement for professional services, whether those of architects or of engineers. The category of buildings that is currently exempted is spelled out in the Ontario Building Code.⁷ It comprises buildings of three storeys or less in building height and 6,000 square feet or less in building area that are not intended for assembly or institutional occupancy.

The agreement submitted to us by the representatives of the OAA and the representatives of the APEO recognizes that there should be a category of buildings exempt from a requirement of professional services. The agreement, however, does not define this category. This is in response to our explicit request. While it might have been quite possible for the parties to supply an agreed-upon definition, we felt

⁷O. Reg. 925/75, s. 2.3.1.

strongly that negotiations carried on with the assistance of our good offices should be confined to the jurisdictional dispute between architects and engineers. The precise definition of what buildings need not require an architect or an engineer is obviously a question in which any number of outside parties (e.g., building contractors, technical personnel, allied professionals) have an interest. Our view was that spokesmen for architecture and engineering should remain quite free to press for any definition they wish, but outside the scope of inter-professional negotiations undertaken with our help.

In this setting, we have approached the question of defining the category of exempt buildings in the light of all the submissions made to us in the course of our inquiry and of all the pertinent consultations we have undertaken. In particular, we have examined the possibility of restricting exempt buildings to free-standing structures. We have also assessed the possibility of defining exempt buildings with reference to square feet of gross floor area, as opposed to square feet of building area. The definition currently contained in the Ontario Building Code stipulates a ceiling of 6,000 square feet of building area. Ontario Building Code officials have confirmed that pursuant to the current definition, a number of row-housing projects have been constructed in Ontario by building contractors without the benefit of professional engineering or architectural services. Many such projects exceed 6,000 square feet in gross floor area, but are less than 6,000 square feet in building area.

While we have no evidence that the existing exemption, defined in square feet of building area, has been injurious to clients or third parties, we also lack evidence that the existing exemption protects public interests adequately. We have duly noted that the spokesmen for architecture have expressed the desirability of defining projects in gross floor area rather than building area. We have also noted that the spokesmen for engineering, while not rejecting the architects' suggestion, have expressed a preference for a definition that emphasizes physical characteristics rather than building size, however the latter might be measured. On the other hand, our conversations with Building Code officials have alerted us to the fact that any change in the existing exemption could impinge on the interests of yet other significant parties, for example, building contractors, who clearly should have an opportunity to be consulted if the existing exemption is to be altered.

Under the circumstances, it has become clear to us that the proper channels through which to contemplate any change in the definition of buildings exempt from professional services are those provided by the Ministry of Consumer and Commercial Relations, which is responsible for the Ontario Building Code. These channels involve the use of ad hoc committees and can involve a wide audience of affected interests. They also bring considerable expertise to bear on questions whose content is almost inevitably highly technical. Given these established channels, *we recommend that:*

- 5.1 The Attorney General should inform the Minister of Consumer and Commercial Relations of the desirability of reviewing at an early date what changes, if any, might be made in the provisions of the Ontario Building Code that exempt defined classes of buildings from a requirement for professional services.**

In any event, with regard to the architectural and engineering professions specifically, what is desirable is that each of the professional statutes should clearly reflect whatever exemptions may be spelled out from time to time in the Ontario Building Code. *The Architects Act* contains a clear anomaly in this regard. Notwithstanding the provisions currently contained in the Ontario Building Code, *The Architects Act* makes it an offence for an individual to offer design services for any building, addition, or renovation whose costs exceed \$10,000.⁸ We are pleased to note that the OAA itself has dropped this provision in its proposals for a revised Act.⁹ We also wish to record our considered view that dollar measures of project costs, particularly when enshrined in statutes, are inherently undesirable even in moderately inflationary circumstances. Consequently, *we recommend that:*

- 5.2 *The Architects Act* should be amended so as to remove from the “holding out” provisions in section 16(3) the exemption for architectural work on buildings, alterations, and additions costing \$10,000 or less.**

⁸See R.S.O. 1970, c. 27, s. 16(3).

⁹Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, Appendix D, “Draft of Revised ‘Architects Act’.”

For the rest, in order to ensure that *The Architects Act* and *The Professional Engineers Act* will define professional services in a manner fully consistent with whatever definitions of exempt buildings may appear in the Ontario Building Code from time to time, *we recommend that:*

- 5.3 *The Architects Act* and *The Professional Engineers Act* should be amended so as to exclude from the definitions of licensed practice the provision of design services for buildings not requiring professional services as these buildings may be defined from time to time in the Ontario Building Code.**

D. Implementing the Agreement

Implementing the agreement that we endorse will require numerous legislative amendments, especially to *The Architects Act* and *The Professional Engineers Act*. The recommendations offered in this chapter, like all others in this Report, are formulated so as to indicate the thrust of the changes we propose. They do not purport to indicate the specific wording of legislative amendments. That task is best reserved to the process of legislative drafting. In this connection, we note that past procedure in Ontario has involved consultation with the affected groups to ensure that technical matters related to professional regulation are accurately covered by the legislative draftsman. Given the technical considerations that surround the definition of scope of practice in architecture and engineering, this procedure should prove particularly useful in the task of redrafting *The Architects Act* and *The Professional Engineers Act*.

As for our own task of formulating recommendations, we have found it convenient to approach the matters covered by the agreement in the following sequence: Prime Consultancy; Definition of Buildings; Certificates of Authorization; and the Joint Practice Board.

D.1 Prime Consultancy

We have already stated why we lend our full support to the agreed-upon principle that a client should be free to select the prime consultant of his choice. So as to indicate in the clearest possible terms our support for this principle, *we recommend that:*

- 5.4 The drafting of any and all revisions to *The Architects Act*, *The Professional Engineers Act*, and any other legislation affecting the scope of practice in architecture and engineering should accord full respect to the freedom of choice currently enjoyed by clients in the selection of prime consultants, be these consultants within or outside the memberships of these two professions.

D.2 Definition of Buildings

Earlier in this chapter, we made recommendations on the legislation that is necessary to define the buildings whose design will not require, by law, any professional services. With respect to all other buildings, implementing the principle that engineers should confine their professional activity to the practice of engineering and architects to the practice of architecture requires a number of amendments to each of *The Professional Engineers Act* and *The Architects Act*. With respect to *The Professional Engineers Act*, we recommend that:

- 5.5 *The Professional Engineers Act* should be amended so as to:

- (a) make it clear that the definition of “practice of professional engineering,” notwithstanding any reference to “steel, concrete, or reinforced concrete structures,” does not include buildings other than industrial buildings or specified mixed occupancy buildings, but does include the structural, mechanical, and electrical systems for all buildings other than those which do not, by law, require any professional services;
- (b) define “industrial buildings” to include factories, warehouses and process plants, and “mixed occupancy buildings” as buildings where the major occupancy is industrial and the minor occupancy does not exceed 4,000 square feet of gross floor area; and
- (c) provide that nothing in the Act shall prevent any architect from performing professional engineering services which are incidental and ancillary to the work undertaken by such architect, provided that such

incidental and ancillary services may not constitute all the engineering services being performed in relation to such work, save with respect to residential buildings not exceeding three storeys in height.

As for *The Architects Act*, we recommend that:

5.6 *The Architects Act* should be amended so as to:

- (a) make it clear that nothing in the Act shall prevent any professional engineer from preparing a sketch, drawing, or specification for an industrial building as defined in *The Professional Engineers Act*, or for an alteration of, or addition to, any such building;
- (b) define the practice of architecture in such a way as to exclude the structural, mechanical, and electrical systems where these form part of the definition of the practice of professional engineering in *The Professional Engineers Act*; and
- (c) provide that nothing in the Act shall prevent a professional engineer from performing architectural services which are incidental and ancillary to the work undertaken by such engineer, provided that such incidental and ancillary services may not constitute all the architectural services being performed in relation to such work.

In our view, it is appropriate that the responsibility for enforcing the scope of practice of engineering and architecture, as redefined in the professional legislation, should be vested in the respective licensing organizations. The agreement has brought to our attention the fact that the enforcement task of these organizations would be facilitated if the administrative provisions of the Ontario Building Code required drawings to be signed and sealed by a professional engineer or architect. We endorse this requirement because it does not implicate Building Code inspectors in whether any particular drawings should have been signed by an architect or engineer. Instead it serves simply to identify the person who purports to be a member of one or the other profession, and who is thereby subject to the disciplinary proceedings of the relevant licensing organization. Accordingly, we recommend that:

- 5.7** Section 2.3.1 of the Ontario Building Code should be amended to provide that the drawings for buildings that require professional services shall be signed and sealed by a person who purports to be an architect or a professional engineer.

D.3 Certificates of Authorization

It is evident that the implementation of the agreement between the OAA and the APEO requires appropriate legislation in the area of Certificates of Authorization. *The Professional Engineers Act* currently authorizes the issuance of Certificates of Authorization to partnerships and incorporated firms if one of their “principal or customary functions” is to engage in the practice of professional engineering. What is required is a clear delineation between firms whose principal activity is the offering of engineering services to the public and other firms. In addition, sole proprietorships must be included among those eligible for Certificates of Authorization. Accordingly, *we recommend that:*

- 5.8** *The Professional Engineers Act* should be amended to enable the Association of Professional Engineers of Ontario to issue to engineering firms Certificates of Authorization in each of the following classes:

- Class A: sole proprietorships, associations of persons, partnerships, corporations, or partnerships of corporations which are primarily engaged in offering professional services to the public;
- Class B: corporations, one of whose customary functions is to engage in the practice of professional engineering but whose principal activity is not the offering of professional services to the public; and
- Class C: single project Certificates issued on a calendar year basis authorizing restricted practice under the responsibility of a licensee.

In that the Ontario Association of Architects has not hitherto issued Certificates of Authorization, appropriate legislation is necessary. However, the nature of architectural practice has been such that a single class of Certificate is appropriate. *We recommend that:*

5.9 *The Architects Act* should be amended to:

- (a) enable the Ontario Association of Architects to issue Certificates of Authorization to sole proprietorships, associations of persons, partnerships, corporations, or partnerships of corporations which are engaged in offering professional services to the public; and
- (b) require architectural firms to hold Certificates of Authorization in order to practise in corporate form.

Also, we recommend that:

5.10 *The Architects Act* should be amended to give the Ontario Association of Architects the same powers and responsibilities over holders of Certificates of Authorization as are currently given to the Association of Professional Engineers of Ontario under sections 20, 24, 25, and 26 of *The Professional Engineers Act*.

What is finally required to implement the agreement between the OAA and the APEO with respect to Certificates of Authorization are appropriate legislative provisions governing the issuance of Certificates of Authorization as of right to sole proprietorships, partnerships, or corporations which already hold Certificates from the other professional body. Accordingly, *we recommend that:*

5.11 *The Professional Engineers Act* should be amended to provide that a Class A Certificate of Authorization be issued as of right to any sole proprietorship, partnership, corporation, or partnership of corporations that holds a Certificate of Authorization from the Ontario Association of Architects and that employs on a full-time basis one or more professional engineers who shall take professional responsibility for the engineering work.

Futhermore, we recommend that:

5.12 *The Architects Act* should be amended to provide that a Certificate of Authorization be issued as of right to any holder of a

Class A Certificate of Authorization from the Association of Professional Engineers of Ontario (APEO) that employs on a full-time basis one or more architects who shall take professional responsibility for the architectural work, and is:

- a proprietorship or partnership of engineers who are members of the APEO;
- a corporation owned solely by engineers who are members of the APEO; or
- a corporation in which majority ownership is held by engineers, or by engineers and architects, and minority ownership is in the hands of individuals who are *bona fide* full-time employees of the firm.

D.4 The Joint Practice Board

Pursuant to the terms of the agreement, a Joint Practice Board is to be created for an initial period of two years. Given this limited initial period, and bearing in mind that early experiences may indicate a need to alter any of a number of provisions affecting the operation of the Board, we consider it highly advisable that the composition and terms of reference of the Board be left to the determination of the Lieutenant Governor in Council. In the realm of legislation, therefore, *we recommend that:*

- 5.13 Each of *The Architects Act* and *The Professional Engineers Act* should be amended to provide that the Lieutenant Governor in Council may create a Joint Practice Board for the professions of architecture and engineering with such membership and terms of reference as the Lieutenant Governor in Council may determine from time to time.**

Turning now to the initial membership of the Joint Practice Board, *we recommend that:*

- 5.14 The Lieutenant Governor, by Order-in-Council, should constitute a Joint Practice Board for an initial period of two years with the following membership and voting procedures:**

- (a) three members appointed by the Ontario Association of Architects, each of whom shall have one vote;

- (b) three members appointed by the Association of Professional Engineers of Ontario, each of whom shall have one vote; and
- (c) a chairman appointed by the Attorney General of Ontario after consultation with the two professions, who shall have a vote in the event of a tie.

With respect to the terms of reference of the Joint Practice Board,
we recommend that:

5.15 The Lieutenant Governor, by Order-in-Council, should set the following as the initial terms of reference of the Joint Practice Board:

- (a) assessing applications from any firm that holds a Class A Certificate of Authorization from the Association of Professional Engineers of Ontario (APEO) and is not by legislation entitled as of right to a Certificate of Authorization from the Ontario Association of Architects (OAA);
- (b) reviewing complaints of an interprofessional nature from members of either Association or persons other than members, relative to building design practice in cases where these complaints could not be resolved by the Associations jointly or severally;
- (c) considering other matters of interprofessional relations including, for example, the coordination and publication of guidelines, standards, criteria, and performance standards in the field of building design and construction; and
- (d) recommending the grandfathering into the OAA of certain engineers who have historically provided architectural services and who have applied within one year of the constitution of the Joint Practice Board or within such further period exceeding one year as the Board may permit; and the grandfathering into the APEO of certain architects who have historically provided engineering services and who have applied on the same terms.

The Order-in-Council should stipulate that in exercising its responsibilities pursuant to the first term of reference above, the considerations that the Joint Practice Board shall take into account in deciding whether or not to recommend to the OAA that a Certificate of Authorization be issued shall include the following:

- (i) the presence of any ownership interests in the firm that could give rise to conflicts with the professional responsibilities of the firm;
- (ii) the reason(s) why the share ownership and/or control is in the hands of other than members of the APEO and/or the OAA;
- (iii) the reason(s) why the share ownership and/or control is in the hands of other than *bona fide* full-time employees of the firm;
- (iv) assurance that certification of the firm would not give rise to unauthorized practice or otherwise lead to circumvention of *The Architects Act*; and
- (v) the nationality and residence of the non-professional owners; that is, owners other than members of the OAA and/or the APEO.

In assessing the merits of the applicant in relation to the above or any other considerations, the overriding criterion shall be that the Joint Practice Board is satisfied that no significant detriment to the public would result from the applicant's acceptance as an authorized firm.

E. Longer-Term Considerations

We salute the representatives of the APEO and the representatives of the OAA for achieving an agreement that promises to resolve the scope of practice dispute in engineering and architecture. It is our considered judgement that the terms of this agreement are not only consistent with, but promise to enhance, the interests of the public. The recommendations we have formulated to forward the implementation of the agreement are testimony to the unqualified nature of our support. Where future relations between the two professions are

concerned, we repeat that we have every expectation that the momentum of interprofessional cooperation that gave birth to the agreement will be carried over into the operation of the Joint Practice Board.

This Board, by agreement, is to have an initial life of two years. We are confident that the Board has the makings of an institutionalized mechanism that will faithfully serve both the professions and the public for many years. We fully support as well the wisdom inherent in an initial trial period of limited duration. The legislative changes we have recommended, if accepted, will result in the implementation of nearly everything required to end the scope of practice dispute once and for all. The only remaining source of potential difficulty with respect to scope of practice probably lies, if anywhere, in the task assigned to the Joint Practice Board of making recommendations to the OAA for the granting of Certificates of Authorization to certain engineering firms whose ownership is such that they will not qualify for these Certificates as of right under the amended legislation. Not least because a number of these firms are already established in the field of building design in Ontario, it will be of the utmost importance that the Joint Practice Board, in formulating its recommendations, and the OAA, in acting upon them, perform and are seen to perform expeditiously, fairly, and in the interests of the public. The understandable concern of both parties to the agreement over the initial results of interprofessional cooperation with respect to this matter is what led to the agreed-upon limitation of two years on the initial life of the Joint Practice Board.

So as to make clear to all concerned our considered view of what should prevail in the unlikely event that the initial life of the Joint Practice Board proves unsatisfactory, *we recommend that:*

- 5.16 If it becomes apparent to the Lieutenant Governor in Council that the Joint Practice Board, on the basis of the first two years of its existence, either has proven incapable of formulating timely and reasonable recommendations or has suffered unreasonable and arbitrary repudiation of its recommendations by the professional bodies concerned, the Lieutenant Governor in Council should appoint a majority of the Board's membership and, if necessary, propose amendments to *The Professional Engineers Act* and *The Architects Act* that would make the decisions of the Joint Practice Board binding on the professional body to which they were directed.

Chapter 6 The Accounting Profession

The history of government involvement in the regulation of the accounting profession in Ontario is a history of recurring outbursts of organizational rivalry and of recurring attempts to snatch harmony from the jaws of discord. The latest episode in this history coincides with our own existence as a Committee and could appropriately be called “The Politics of Organizational Insurgency.” Our terms of reference make it clear that we are expected to make our own attempt to restore harmony. The latest episode is therefore one in which we duly make our appearance. Its ending, as in the case of the earlier episodes, will be orchestrated on the floor of the Legislature.

A. The Politics of Organizational Insurgency

The accounting profession has been historically, and remains in several Canadian provinces, a “reserved title” profession whose practitioners have exclusive rights to use the titles bestowed by the organizations of which they are members, but do not have exclusive rights to practise; that is, they are not licensed. Other than in what has come to be called “public accounting,” the profession remains unlicensed in Ontario. Essentially, public accounting comprises those activities which are designed to lend credibility to financial information. The desirability of licensure in public accounting rests largely on the premise that the association of an independent accountant—by signature, letterhead, attachment of comments, etc.—with the financial information issued by an economic entity lends credibility to that information in the eyes of those who use it. The users, be they actual or potential investors or creditors, constitute potentially vulnerable third party interests whose protection is thought to be enhanced by a regime of licensed practice.

The remaining services provided by the accounting profession are of significance primarily to the clients who purchase them. These services encompass tax advice, financial advice, and more generally, the services designed to facilitate the financial management of an enterprise (management accounting). Here reserved titles play an important role in conveying “quality signals” to clients, but an exclusive right to practise is neither justifiable in principle nor sought by the professionals themselves. At present in Ontario, there are four recognized organizations whose members, all of whom hold reserved titles, provide general accounting services. They are the Certified General Accountants Association of Ontario (CGAAO), the Institute of Accredited Public Accountants of Ontario (IAPAO), the Institute of

Chartered Accountants of Ontario (ICAO), and the Society of Management Accountants of Ontario (SMAO).

As for the licensed practice of public accounting in Ontario, it is in effect restricted to members of the ICAO. In Quebec, the Chartered Accountants enjoy the same exclusive rights. British Columbia is the third major province in which public accounting is licensed, but there both Chartered Accountants and Certified General Accountants are licensed to practise public accounting, and members of other accounting organizations (and, for that matter, unaffiliated individuals) may be licensed if they satisfy the Auditor Certification Board of British Columbia that they hold the necessary qualifications.

The licensed practice of public accounting in Ontario began with *The Public Accountancy Act* of 1950.¹ This Act recognized two qualifying organizations, the ICAO and the Certified Public Accountants Association of Ontario. It created a licensing body called the Public Accountants Council, which was composed of eight Chartered Accountants (C.A.'s) appointed by the ICAO, five Certified Public Accountants (C.P.A.'s) appointed by the Certified Public Accountants Association, and two other members elected by all licensees other than C.A.'s or C.P.A.'s. The Act contained generous grandfather provisions which licensed individuals who were in practice at the time of its enactment but were not members of the two qualifying bodies. This group, comprising about 900 individuals, was initially almost as large as the combined number of C.A. and C.P.A. licensees. Members of this group formed the Independent Public Accountants Association shortly after the passage of the legislation. Many of the "independent" licensees were also members of already existing professional organizations, notably the International Accountants and Executives Corporation and the Accredited Public Accountants Association, both formed in the 1930's. All three organizations merged into the Institute of Accredited Public Accountants of Ontario (IAPAO) in 1957 and 1958.

Also in 1957, the Certified General Accountants Association of Ontario (CGAAO) was incorporated by Letters Patent² and affiliated with the General Accountants Association which had existed under federal statute since 1913.³ Members of the CGAAO were not licensed to practise public accounting, save insofar as a number of them held

¹R.S.O. 1950, c. 302.

²Letters Patent, August 14, 1957.

³The *General Accountants Association Act*, S.C. 1913, c. 116.

dual membership in the Certified Public Accountants Association which, along with the ICAO, was one of the qualifying bodies under *The Public Accountancy Act* of 1950. In 1958, however, the Certified Public Accountants Association banned joint membership with the CGAAO, and the majority of the individuals affected opted to retain their C.P.A. membership, thereby creating a substantial drop in the number of Certified General Accountants (C.G.A.'s). The CGAAO in turn petitioned the Premier in 1961 to become a qualifying body under *The Public Accountancy Act*.

But this was not to be. Merger discussions between the ICAO and the Certified Public Accountants Association had begun in the fall of 1960 and bore fruit in 1962. New legislation, *The Public Accountancy Act* of 1962,⁴ continued the licensure regime under the Public Accountants Council, but recognized the enlarged ICAO as the sole qualifying body. Once again, grandfather provisions licensed all individuals then practising public accounting in Ontario. These provisions covered the members of the Institute of Accredited Public Accountants (IAPAO) and certain C.G.A.'s. Of course, neither the IAPAO nor the CGAAO was a qualifying body. But the CGAAO continued to conduct its educational programme as a reserved title organization. The IAPAO, on the other hand, was effectively denied new membership by a provision in its Letters Patent that, after 1963, restricted its membership to individuals licensed under *The Public Accountancy Act*. Thus deprived of new entrants, the IAPAO was destined to be a dying organization. The CGAAO, for its part, would live indefinitely, but not being a qualifying body under *The Public Accountancy Act* of 1962, it was destined to a life as a reserved title organization outside the licensed field of public accounting.

At this juncture, then, the route to licensure in public accounting lay through the sole channel of the ICAO. Meantime, the destiny of the CGAAO appeared to coincide with the path long followed by the Society of Management Accountants of Ontario (SMAO). This organization, incorporated with the original name of the Society of Industrial and Cost Accountants by the Ontario Legislature under a private member's bill in 1941,⁵ grants the reserved title of Registered

⁴S.O. 1961-62, c. 113.

⁵*An Act to Incorporate the Society of Industrial and Cost Accountants of Ontario*, S.O. 1941, c. 77. The Society's recent change of name to the Society of Management Accountants of Ontario was effected by Supplementary Letters Patent #57831 in April, 1977.

Industrial Accountant (R.I.A.). In 1962, the Government of Ontario expressed the wish that the CGAAO and the SMAO "undertake discussions with the object of developing one strong group in the non-practising field."⁶ Serious negotiations ensued, but were broken off in 1974. The interests of the CGAAO spanned more than management accounting; in that year, the CGAAO petitioned the Government of Ontario (as it had in 1961) for access to the licence in public accounting.

In the interval, the Institute of Accredited Public Accountants, for its part, had not proved content to lie quietly on the deathbed to which it had been consigned in 1962. As reconstituted under the 1962 legislation, the Public Accountants Council numbered fifteen members, twelve appointed by the Council of the ICAO and three elected by non-C.A. licensees, often Accredited Public Accountants (A.P.A.'s). The minority of three pressed unsuccessfully in 1965 to make the Council the educational and qualifying body as well as the licensing body. Then, in 1967, the IAPAO made a submission to the McRuer Royal Commission Inquiry into Civil Rights, charging that it was being denied the right to qualify individuals for the public accountant's licence. The IAPAO again challenged the ICAO's position as the sole qualifying body in a brief to the Ontario Minister of Financial and Commercial Affairs in 1970. Then, in 1975, the three non-C.A. members of the Public Accountants Council, all of them A.P.A.'s, voiced to the Government of Ontario their sympathy for a number of points raised in the CGAAO petition of 1974.

This is the background of organizational rivalry that awaited our arrival on the scene as a Committee in 1977. The current membership of the four existing accounting organizations is shown in Table 6.1. In membership terms, the IAPAO is inconsequential, but this is because of the deathbed status to which it has been unwillingly consigned. The remaining three organizations speak with their different voices on behalf of over 20,000 members of the accounting profession in Ontario and a similar number of students. Were there only two accounting organizations in Ontario, the ICAO and the SMAO, the problems attendant upon the regulation of the profession would be greatly simplified. The ICAO is pre-eminently oriented

⁶Quoted in Society of Management Accountants of Ontario, Brief to the Professional Organizations Committee, October, 1977, p. 6.

towards public accounting; the SMAO, towards management accounting. The main regulatory problems would therefore revolve around the demarcation line between public and management accounting, and the extent to which a licensure regime should be maintained.

Table 6.1

**Membership Data for Accounting Organizations in Ontario,
September, 1979**

| | Members | Students |
|---|---------|----------|
| Certified General Accountants Association of Ontario | 3,038 | 7,281 |
| Institute of Accredited Public Accountants of Ontario | 148 | — |
| Institute of Chartered Accountants of Ontario | 13,959 | 4,316 |
| Society of Management Accountants of Ontario | 4,801 | 9,927 |

Source: Letters received by the Professional Organizations Committee from: the Certified General Accountants Association of Ontario, October 1, 1979; the Institute of Accredited Public Accountants of Ontario, August 28, 1979; the Institute of Chartered Accountants of Ontario, September 5, 1979; and the Society of Management Accountants of Ontario, September 17, 1979.

The existence of the CGAAO, a self-evidently healthy organization in its own right, challenges what might otherwise be an easy equilibrium. Some of the members of this organization are oriented towards management accounting. Some, however, are oriented towards public accounting. In the provinces where the accounting profession is totally unlicensed, C.G.A.'s may freely practise public

accounting. In British Columbia, where public accounting is licensed, C.G.A.'s have access to the licence on the same terms as C.A.'s. In Ontario, as for that matter in Quebec, licensure regimes effectively bar C.G.A.'s from public accounting.

The interest of the CGAAO in gaining access to the licensed public accounting field becomes an understandable barrier to merger with the SMAO, given the strong orientation of the latter to management accounting. Equally understandable is the ICAO perception of the CGAAO aspirations in the licensed public accounting field; these are seen as the aspirations of a rash and unwelcome insurgent. For its part, the CGAAO can argue cogently that, in public interest terms, it should be perceived as a welcome rather than unwelcome insurgent, challenging as it does a monopoly which does not exist in a number of other Canadian jurisdictions. Meantime, the possibility that the CGAAO claim may be meritorious begins to affect the organizational stance of the SMAO. This organization cannot stand idly by if another organization is about to bridge both public and management accounting. In such an eventuality, as the SMAO has put it to us, perhaps a complete revamping of all accounting organizations, possibly involving the creation of a vast umbrella organization, is warranted.

The condition of organizational rivalry, indeed insurgency, that characterizes the current state of the accounting profession is an eminently political condition and can only be resolved through political mechanisms of adjustment. Where, as in the case of the engineering and architectural professions, the nature of the professional dispute exists in a context of jurisdictional ambiguity, the courts provide a ready-made instrument for testing the scope of existing legislation. If the results are deemed unsatisfactory by the parties, a process of mediation can hope to secure a tenable outcome. Where, on the other hand, the nature of the dispute involves insurgency, no judicial interpretation of the existing legislation which clearly bars the insurgents by recognizing the ICAO as the sole qualifying body, can have a bearing on the dispute. In our democratic system, the only effective mechanisms of adjustment lie in the Legislature and involve an appeal to public opinion.

Judging from the number of expressions of concern we have received from members of the Ontario Legislature in the course of our work, the CGAAO is making effective use of the mechanisms that are

properly available to it. We are also conscious of the ongoing C.G.A. campaign in Quebec, whose licensure regime in public accounting is basically the same as Ontario's. There, full-page advertisements in major daily newspapers, notably *Le Devoir* and *Le Soleil*, have submitted the merits of the C.G.A. claim to the court of public opinion. Mediation, as attempted in that province by the Office des Professions, has not borne fruit. And as for the possibility of massive grandfathering into the ranks of Chartered Accountants, our own public meetings in Ontario elicited the following eloquent remark from the First Vice-President of the CGAAO: "And if we can leave you with no other impression, it would really be that - that we are not anxious to join the Institute of Chartered Accountants. They are entitled to their regiment, and we are entitled to our regiment. But in a war, it's the results which will show as to which regiment happens to be the most competent."⁷ Such is the politics of organizational insurgency.

B. Alternative Resolutions

The politics of organizational insurgency generates an environment in which quests for resolution necessarily proceed under circumstances in which helpful contributions from the professional organizations concerned are circumscribed. The accounting organizations have given us invaluable assistance in certain respects, educating us on the nature and content of public accounting and more generally contributing to our capacity to discern workable modes of regulation. But they have understandably stopped short of inviting a compromise of their fundamental aims and objectives.

The Institute of Accredited Public Accountants of Ontario cannot be expected to approve of its status as a deathbed organization. Nor can the Certified General Accountants Association of Ontario be expected to abandon an insurgent role which it deeply believes is in the public interest. The Institute of Chartered Accountants of Ontario, for its part, can hardly be expected to relinquish willingly the current statutory recognition of its position of pre-eminence in public accounting. The Society of Management Accountants of Ontario, meantime, cannot be expected to say that any

⁷Professional Organizations Committee, *Transcripts of Public Meetings with Accounting Organizations*, Open Question Period, June 1, 1979, p. 864.

organizational or regulatory resolution that might be acceptable or imposed in the realm of public accounting will be a matter of indifference to the realm of management accounting.

In such circumstances, the one thing that can be said with assurance is that no resolution can satisfy all four accounting organizations equally. Our own prescription is hardly likely to constitute an exception. We therefore consider it particularly appropriate to canvass the alternatives we pursued as a preface to formulating the resolution we prescribe. There were four such alternatives: de-licensing public accounting; direct government licensing of public accounting; vesting exclusive authority over the public accounting licence in the Institute of Chartered Accountants of Ontario; and the British Columbia licensure regime.

B.1 De-licensing Public Accounting

Two of the three authors of the major working paper we commissioned, *An Analysis of the Practice of Public Accounting in Ontario*, supported the de-licensure of public accounting in Ontario.⁸ In their argument favouring de-licensure, Fred Lazar and J. Marc Sievers noted a lack of evidence that the public is worse off in unlicensed jurisdictions. Indeed, the public might be better off in an unlicensed environment because clients would be freer to trade off price for quality when purchasing accounting services. Quality would continue to be protected in any event given the strength of financial institutions, which would place sufficient pressure on business firms to consider quality as an important factor in purchasing accounting services.

Under de-licensure, all reserved title accounting organizations would continue to use their reserved titles to provide quality signals to the public, and the competition among them for professional reputation would also protect quality. As for the degree of ignorance among either clients or users of financial information that is so often cited as justification for licensure, there is no convincing evidence of its existence, and in any event the civil liability mechanism provides substantial protection.

⁸Fred Lazar, J. Marc Sievers, and Daniel B. Thornton, *An Analysis of the Practice of Public Accounting in Ontario*, Working Paper #8 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), especially Chapter 4.

In public interest terms, we discern considerable merit in the argument for de-licensing public accounting. In the narrower context of the organizational rivalry that has accompanied governmental initiatives to regulate public accounting, de-licensure becomes positively tempting in that it proclaims, "a plague on all your houses." After due deliberation, however, we cannot conclude that de-licensure is in the public interest.

In other North American jurisdictions, including Canadian provinces in which accounting in its entirety remains a reserved title profession, the trend has been towards the licensing of public accounting, not away from it. Ontario has licensed public accounting since 1950, and its reputation for sound financial practices among investors throughout the world, however intangibly it may be linked to the existence of a licensure regime, is not something with which to tamper lightly.

Professor Daniel Thornton, the third author of *An Analysis of the Practice of Public Accounting in Ontario*, argues that many clients and most users of financial information are incapable of assessing the tradeoff between price and quality, and that professional ethics, backed by a licensure regime, remain the best available means of ensuring that clients will be neither under-served nor over-served.⁹ The Staff Study, for its part, deems the protection of third party interests, particularly when shareholders or potential shareholders are numerous and widely dispersed, sufficiently important to warrant licensure, notwithstanding the protection of the civil liability mechanism and however unquantifiable the degree of investor ignorance may be.¹⁰

We are also aware of the argument that de-licensure might depreciate the esteem that the public accords to the accounting designations held by public accountants who now practise under a licensure regime. The consequence, so this argument holds, might be to enhance client reliance on the "brand names" of the largest and most established accounting firms, thereby reducing competition in the provision of accounting services. It is also possible, as Professor

⁹*Ibid.*, Chapter 5.

¹⁰See Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), pp. 91-104.

Thornton argues, that a consequence of de-licensure would be to drive high quality practitioners out of small firms, whose principal clients are small businesses, and into the large firms that service major enterprises.

For all these reasons we cannot, on balance, support de-licensing public accounting in Ontario.

B.2 Government Licensing of Public Accounting

The licensure regime now in place in Ontario displays certain elements of government licensing. Strictly speaking, the Public Accountants Council is not a government agency. But it is a statutory agency quite distinct from the professional bodies which would issue licences if licensure in public accounting were the preserve of a classic self-governing profession. As we have already noted, the ICAO is the sole qualifying body under *The Public Accountancy Act* of 1962. But the ICAO is not a licensing body. Only the Public Accountants Council may issue licences. The ICAO, under its statute, gives its members only the right to the reserved title of Chartered Accountant.

The existence of organizational rivalry in the accounting profession invites consideration of government licensing of public accounting, or of some variation on the theme of the Public Accountants Council. A wide range of models is available. At one end of the spectrum, it is possible to conceive of a licensing body with all the functions that are otherwise vested in a self-governing profession. This body would not only issue licences, but would be responsible for all associated functions from educational standards and codes of ethics to discipline, practice inspections, and continuing competence. Existing organizational rivalries could be diluted by means of a governing council composed largely of Lieutenant Governor in Council appointees. The current reserved title organizations would have been rendered redundant in the realm of public accounting, and their scope of functions would be reduced accordingly.

In principle, we harbour grave reservations about any model such as the one sketched above. We return to fundamental considerations which we believe, as we outlined in Chapter 1, speak strongly in favour of regulation by self-governing professions. The costs of replicating within government knowledge that exists within professions are not negligible. More important, the vesting of regulatory

responsibility in the professions themselves mirrors and reinforces the trust relationship that must exist between professionals and their clients. To us, the existence of organizational rivalry does not justify a retreat from the extent of self-government that now characterizes the accounting profession. Furthermore, such a retreat might prove in practice to be a non-solution to the extent that the Lieutenant Governor in Council appointees could not discharge their responsibilities without relying heavily on the members of the accounting profession whose own expert contribution might be coloured by existing rivalries.

At the other end of the spectrum, it is possible to conceive of a licensing body very like the Public Accountants Council with a membership similar to self-governing bodies; that is, licensees augmented by a few lay appointees. The main difference from the current Council would be that no single accounting organization would have more than a minority of the Council membership, and that the ICAO would lose its current status as the sole qualifying organization. The functions of this new Council would be limited to issuing and revoking licences, and all other functions would be left to the accounting organizations. We are fearful that such a Council would simply provide an institutionalized forum for the continuation of organizational rivalry, and we have reason to doubt that even its limited functions would be performed adequately. In this connection, we note that many of the functions vested in the current Public Accountants Council are in abeyance because they duplicate functions that are effectively discharged by the ICAO, whose members constitute the vast majority of licensees.

A proposal advanced to us by the IAPAO falls somewhere between the two models just examined.¹¹ This proposal asks us to consider a revamped Public Accountants Council that would exercise all the basic functions associated with a self-governing profession. The Council would be composed of four members of the IAPAO, four members of the CGAAO, six members of the ICAO, two members of the SMAO, one other accounting member, and three lay persons. Given its comprehensive range of functions, the Council would have

¹¹Institute of Accredited Public Accountants of Ontario, *The Choice!*, September, 1979, pp. 133-139.

committees on standards, education, enforcement, professional conduct, appeals, and applications. Once again, however, the proposed composition of the Council seems to us to fly in the face of the current climate of organizational rivalry. As well, such a proposal raises a question which must be faced: the extent to which the licensure of public accounting should respect the pre-eminence of the Chartered Accountants in this field.

B.3 The Institute of Chartered Accountants of Ontario as Sole Licensing Body

In the words of the Staff Study:

It is our considered opinion that the Institute of Chartered Accountants of Ontario is the organization that can best be relied upon to develop, maintain and enforce standards of its members. Almost all those currently licensed to perform external audits are members of the Institute . . . and all new licensees must qualify through the Institute. The disciplinary procedures of the Institute received more favourable comment in the working paper on discipline prepared for the Professional Organizations Committee than did those of any other accounting group (or indeed, than any professional body reviewed). Furthermore, the Canadian Institute of Chartered Accountants is without question pre-eminent in the development of accounting principles in Canada.¹²

We fully concur with the above opinion. Doubtless this state of affairs is in part a reflection of the current licensing regime which has made the ICAO the sole qualifying body in public accounting since 1962. Equally doubtless, it is in part a credit to the organization itself.

In this light, what the Staff Study proposed was to make the ICAO the sole licensing body, but to restrict the scope of the licence in public accounting to statutory audits. Accounting would be a reserved title profession with respect to all other services, including voluntary audits and non-audit reviews. According to the Staff Study, the pre-eminence of the ICAO in public accounting would be recognized by an exclusive licensing role where licensure matters most; that is to say, where licensed audits protect the interests of widely

¹²Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 10, p. 97.

dispersed users of financial information concerning publicly held corporations. It is among these diverse and remote third parties that lack of financial sophistication is most likely to be prevalent. These third parties, given their diversity and remoteness, are also the most difficult to protect through civil liability procedures.

There is much to commend the Staff proposal. In principle, this proposal is based on reasoned consideration of what interests are most likely to need the protection of a licensed regime in public accounting. From a practical standpoint, it recognizes the pre-eminence of the ICAO. The proposal is also attractive in that it draws a bright line between licensed and unlicensed accounting services at a point that is easily understood by the layman. This is the point at which companies legislation, precisely for the protection of third party interests, demands that regular audits be performed.

We have chosen not to endorse the Staff proposal only after careful deliberation. In principle, we came to find this proposal wanting in two respects. The first is that the dividing line it posits between licensed and unlicensed work is too narrow to do justice to the inherent nature of public accounting. The second is that the proposal rests on the ground that only the interests of diverse and remote users require the protection that licensure entails.

To begin with the matter of definition, the thrust of the submissions presented to us at our public meetings by all four accounting organizations was that the regulatory regime must respect what, by its inherent nature, is public accounting. This includes not only auditing, but an important part of public accounting that has come to be known as the non-audit review. In the latter instance, a public accountant, while not pronouncing an auditor's opinion on financial information, nonetheless adds credibility to that information by associating himself with it to the extent that he reports that he has made a review consisting primarily of inquiry, comparison, and discussion of information supplied to him by the client. A review is less than an audit with respect to the procedures performed and the evaluation standards applied. However, the nature of the judgement to be made presumes that the professional skills of the reviewer are at least equal to those called for in the performance of an audit.

Thus did we learn that the scope of public accounting should be deemed to involve more than audit work, and we are duly grateful

to the professional accounting organizations for enlightening us in this respect. In particular, we cannot refrain from observing that the Society of Management Accountants of Ontario was as firm in its view of what should be included in public accounting as any other body. We note this because an organization that is pre-eminently oriented towards management accounting certainly has nothing to gain from a definition of licensed public accounting that is broader than the one envisaged in the Staff Study.

Turning now to our second consideration, an enlarged definition of public accounting, if this field is to be licensed, must be viewed in light of the range of interests whose protection is being sought. If the scope of the licence extends beyond statutory audits, the interests whose protection is sought go beyond diverse and remote third party interests. Do the interests of closely involved third parties and, for that matter, of clients warrant such protection? We have concluded that they do, not least in light of the utility of non-audit reviews. Such reviews may often constitute an efficient alternative to more costly and time-consuming audit services. If only audits were afforded the protection that is perceived to flow from licensed status, investors and financial institutions might well opt to demand full audits where a non-audit review would otherwise suffice. The resulting costs to clients, many of which will be small businesses, are not difficult to discern. For these reasons, we deem it inadvisable on public interest grounds to limit the scope of licensed practice to statutory audits.

In the narrower context of the prevailing climate of organizational rivalry within the accounting profession, we might add at this juncture that there are practical grounds on which to believe that an exclusive licensing role for the ICAO in statutory audits would constitute a non-solution. In particular, to say to the CGAAO that their members can freely perform voluntary audits is to invite the reply that if C.G.A.'s are deemed sufficiently competent to audit major closely held enterprises (e.g. Eaton's), they surely possess the competence to perform statutory audits. In this connection, we note that the current dispute between C.A.'s and C.G.A.'s in Quebec takes place in a regulatory context where the auditing of cooperatives is unlicensed. In that cooperatives are a highly significant component of the private sector in that province, the C.G.A.'s can view their access to cooperative audits, coupled with their exclusion from company audits, as particularly arbitrary. In the Ontario context, excluding C.G.A.'s

only from the performance of statutory audits is open to being viewed in a similar light.

If for all the above reasons we deem it desirable that the licensed practice of public accounting in Ontario should encompass more than statutory audits, are there grounds for stating once and for all that the pre-eminence of the ICAO in public accounting warrants its becoming the sole licensing body? On its face, *The Public Accountancy Act* of 1962, recognizing as it did the ICAO as the sole qualifying body, pointed Ontario in this direction. In the practical realm, however, it is one matter to put things in a nutshell and quite another to keep them there. As we have seen, *The Public Accountancy Act* was never fully accepted by the profession and it has come under particularly vigorous attack in the last few years.

For us to propose that the struggle over who should license public accounting should be finally resolved in favour of the ICAO, we would have to be convinced that the resulting monopoly position is beyond reasonable doubt in the interests of the public. In conscience, we cannot declare ourselves to be so convinced. This is not to question the pre-eminence or, for that matter, the competence of the ICAO. But this is to say that monopoly privileges must always be subject to the most careful scrutiny in the light of all available alternatives. In architecture, engineering, and law, where licensure has always been the sole preserve of a single self-governing professional body, alternatives short of de-licensure, itself undesirable on public interest grounds, are unavailable. In accounting, on the other hand, a self-evidently large and healthy organization, the CGAAO, proclaims itself ready and available to provide an alternative to monopoly. Such a claim is not to be dismissed lightly.

B.4 The British Columbia Licensure Regime

The British Columbia licensure regime, as we have already pointed out, gives C.A.'s and C.G.A.'s access to the licensed practice of public accounting on a parity basis. Members of other accounting organizations and unaffiliated individuals may also be licensed if they satisfy the Auditor Certification Board of British Columbia that they hold the necessary qualifications. Obviously, the adoption of the British Columbia regime in Ontario would preclude an ICAO monopoly and thus satisfy the aspirations of the CGAAO.

After contemplating the British Columbia licensure regime, we came to the conclusion that it presents severe shortcomings in the context of Ontario. For one thing, the scope of the licence in British Columbia is narrowly focused on the auditing of public companies. For reasons we have already outlined, we believe that such a narrow definition fails to do justice to the inherent nature of public accounting, with significant consequences for the interests of the public. Of course, it is easy to conceive of a British Columbia type of licensure regime with a more broadly defined scope of licensed practice. But we believe that this would fly in the face of a more fundamental consideration—the current state of the accounting profession in Ontario.

We have already expressed the considered opinion that the ICAO is pre-eminent in the field of public accounting. This is in part a consequence of the licensing regime that has been in place since 1962. That same licensing regime has had an impact on other accounting organizations as well. Save for those of its members who were grandfathered in 1962, the CGAAO has been kept out of the realm of public accounting. This has meant that most CGAAO members have acquired their expertise, and practise, in the non-public branches of accounting.

This legacy aside, the CGAAO is true to its name when it presents itself as an association of *general* accountants. Indeed, the newspaper advertisements that publicize the CGAAO educational programme hold out that one of its unique advantages is the opportunity to specialize in any one of four distinct branches of accounting, public auditing constituting one of these options.¹³ In this light, a British Columbia type of licensure regime, in giving automatic access to the public accounting licence to all C.G.A.'s, would in Ontario do worse than ignore the established pre-eminence of the ICAO. It would fail to do justice to the very nature of the CGAAO as an association of general accountants, only some of whom will be oriented towards, and qualified in, the realm of public accounting.

¹³In the advertisement that appeared in *The Toronto Star*, July 8, 1978, these options are described as Financial Accounting, Controllershship, Taxation, and Auditing. The advertisement that appeared the following year in *The Globe and Mail*, October 22, 1979, lists Financial Management, Taxation, Public Auditing, and Public Administration (Government), plus a fifth General Option for individuals who do not wish to specialize.

For these reasons, we deem that the importation into Ontario of the British Columbia licensure regime would be at once impractical and undesirable.

C. A Proposed Resolution

We have canvassed at some length four possible approaches to the controversial question of how the regulation of public accounting might be resolved in Ontario for several reasons. The first is to disclose the content of our deliberations as fully as possible to all parties concerned. The second is to be of the greatest possible assistance to those who will be responsible for the eventual decision that must be made. In that those charged with making this decision may choose to differ from our judgement on the merits of these options, we have wished to ensure that they are aware of the options that are available. The third reason is that our own proposed resolution literally evolved from our consideration of the options just canvassed. The merits of this resolution are most easily presented in the context of our deliberations over the available options.

These deliberations yield the following fundamental points. First, public accounting should remain licensed in Ontario. Second, government licensing is to be avoided and the licensure regime should approximate to the greatest possible degree the model of a self-governing profession. Third, the scope of the licence should respect the inherent nature of what constitutes public accounting. Fourth, the licensure regime should respect the established fact that the ICAO is pre-eminent in the field of public accounting. Fifth, the licensure regime should avoid awarding a monopoly in licensed practice to the members of the ICAO in light of the fact that an alternative to monopoly is available. Sixth, the licensure regime should respect the organizational orientation of the CGAAO as an association of general accountants, only some of whom will be oriented towards public accounting.

We propose to meet these requirements by prescribing as follows. In brief, what we propose is that each of the CGAAO, the ICAO, and the SMAO should continue as reserved title organizations, and that they should also be empowered to grant public accounting licences to those of their members who are qualified. As licensing bodies, these three organizations should all be constituted in accordance with the

structures and processes of professional self-government, as outlined in detail in Chapter 2 of this Report. They would accordingly acquire general responsibility for the educational requirements, codes of ethics, discipline, practice inspection, and continuing competence of their members. The Public Accountants Council would thereby become redundant and should be abolished.

Chartered Accountant licensees should thereupon be entitled as of right to public accounting licences from the ICAO. Non-C.A. licensees should be similarly entitled to public accounting licences from the CGAAO, save that R.I.A. licensees, all or most of whom hold dual designations as R.I.A.'s and C.A.'s, should be free to choose to hold their licences from either the ICAO or the SMAO. The scope of the licence in public accounting should be statutorily defined to encompass both audits and non-audit reviews, and the legislation should require all accountants who associate themselves with financial information that has not been subjected to audit or non-audit review procedures to sign a statutory disclaimer clause.

To protect the interests of the public, the statutes of each of the three licensing bodies we propose should stipulate that failure to adhere to the principles and standards prescribed from time to time in the Handbook of the Canadian Institute of Chartered Accountants shall constitute *prima facie* evidence of professional misconduct or incompetence. The legislation should provide as well that such failure is to be taken by the courts as *prima facie* evidence of negligence in civil liability actions. The legislation should also stipulate that no candidate may be admitted to licensed practice unless he has passed a common licensing admission examination to be administered by a new body, which we would call the Public Accounting Licensing Admission Board. This Board, which we propose be created by statute, would include representatives from each of the three licensing bodies as the minority membership.

The Board would be empowered to administer a common examination to candidates who have been presented by any of the three licensing bodies in accounting. It would also be empowered to advise the Lieutenant Governor in Council on the acceptability of the regulations proposed by each of the three licensing bodies that pertain to their academic and practical training requirements. We propose that the Attorney General should inform the ICAO of the desirability of placing the Uniform Final Examination used by that body under the

administration of the Public Accounting Licensing Admission Board. In the event that this examination cannot be made available under terms that are acceptable to the Board, the Board should set and supervise the marking of its own examination for admission to the licence in public accounting in Ontario.

Let us now elaborate on the content of our proposal and formulate concrete recommendations in its support. First, the ICAO and the SMAO should retain their status as statutorily recognized accounting organizations with the right to bestow their current reserved titles on individuals who so qualify. The CGAAO, which at present is incorporated under Letters Patent should receive the same statutory recognition and the same protection of its reserved title as the ICAO and the SMAO. Therefore, *we recommend that:*

- 6.1 **There should be enacted a statute called “The Certified General Accountants Act,” this statute establishing the Certified General Accountants Association of Ontario as a reserved title organization; and *The Chartered Accountants Act* and *The Society of Industrial Accountants of Ontario Act* should continue, the latter to be known henceforth as “The Society of Management Accountants Act.”**

What we propose next is that each of the ICAO, the CGAAO, and the SMAO should be empowered to admit those of their members who may qualify to the licensed practice of public accounting. While we wish to accord due recognition to the pre-eminence of the ICAO in the field of public accounting, we do not believe that its current monopoly position is warranted. We shall elaborate upon the degree of recognition that we would accord to the pre-eminence of the ICAO below. Before doing so, we declare our support for the general thrust of the claim put forward by the CGAAO.

As we have already stated in this chapter, we are not convinced that a monopoly position on the part of the ICAO is beyond reasonable doubt in the interests of the public, given the available alternatives. The claim put forward by the CGAAO opens the alternatives. It is not simply that the CGAAO is an evidently large and healthy organization. This organization can and should promote a degree of diversity in the preparation required of those who aspire to practise public accounting. We do not question the policy whereby the ICAO, in its wisdom, deemed it appropriate in 1970 to require a university degree

for admission to the reserved title of Chartered Accountant. On the other hand, we deem it entirely appropriate to give legitimacy to the claim of a rival organization, the CGAAO, that it can provide adequate alternative preparation for the licensed practice of public accounting. This claim, to be sure, must in all fairness be subject to an appropriate test, but to the extent that this test is met, the CGAAO will be a source of opportunity for non-university graduates and in particular, given the structure of the Ontario post-secondary system, for those who have chosen to study in the Colleges of Applied Arts and Technology.

Why do we propose that the SMAO should join the ICAO and the CGAAO as a licensing body in public accounting? Such a status has not been requested. We propose that this status be offered to the SMAO for two reasons. The first is that we appreciate why the SMAO has reserved its position on what might constitute a satisfactory organizational framework for the accounting profession, given a claim by the CGAAO which, if granted, would permit this Association to bridge the fields of public and management accounting. The second is that we recognize that a number of members of the SMAO also practise public accounting but, under the current licensure regime, do so by holding the designation of C.A. as well as the designation of R.I.A. Given the more open licensure regime we propose, it appears to us quite unfair to require by law that members of the SMAO who wish to practise public accounting must support through their membership a second accounting organization.

So as to approximate, within each of the CGAAO, ICAO, and SMAO, the model of a self-governing profession, these organizations should acquire by statute, along with the right to issue licences for the practice of public accounting, the same general powers and responsibilities as are vested in the governing bodies of the architectural, engineering, and legal professions. In particular, the three accounting organizations should be constituted in accordance with the structures and processes of professional self-government recommended in Chapter 2 of this Report. Accordingly, *we recommend that:*

6.2 *The Chartered Accountants Act*, the renamed “Society of Management Accountants Act,” and the proposed new “Certified General Accountants Act” should respectively empower the Institute of Chartered Accountants of Ontario, the Society of Management Accountants of Ontario, and the Certified General Accountants Association of Ontario to license the practice of

public accounting in Ontario and should constitute these organizations in accordance with the structures and processes of professional self-government recommended in Chapter 2 of this Report.

The above recommendation permits us to propose the termination of the Public Accountants Council. As matters stand, the existing mandate of the Council has needlessly overlapped with functions that the ICAO now performs most effectively with respect to its licensed members, who as of September, 1979, comprised 6,160 of the 6,581 licensed public accountants in Ontario. Therefore, *we recommend that:*

6.3 *The Public Accountancy Act* should be repealed.

Also, we recommend that:

6.4 All Chartered Accountants who currently hold licences to practise public accounting in Ontario should be entitled as of right to hold licences from the Institute of Chartered Accountants of Ontario.

An indeterminate number of members of the Society of Management Accountants of Ontario are currently licensed to practise public accounting in Ontario. All or most such R.I.A.'s hold dual qualifications as C.A.'s. Given the more open licensure regime we propose, we believe that such dually qualified individuals should be free to choose whether they wish to hold their public accounting licences from the SMAO or the ICAO. Accordingly, *we recommend that:*

6.5 All Registered Industrial Accountants who currently hold licences to practise public accounting in Ontario should be entitled as of right to hold licences from the Society of Management Accountants of Ontario; any Registered Industrial Accountant licensee who is also a qualified Chartered Accountant should have the right to choose whether he or she wishes to be licensed by the Institute of Chartered Accountants of Ontario or by the Society of Management Accountants of Ontario.

There remain over 400 other individuals who currently hold licences from the Public Accountants Council. As of September, 1979, 69 of these individuals were C.G.A.'s, and we would accordingly

propose that these licensees be entitled as of right to public accounting licences from the CGAAO. Another 352 licensees were classified by the Public Accountants Council as “other.” This number includes the 148 members of the Institute of Accredited Public Accountants of Ontario.

We consider that these experienced members of the accounting profession in Ontario have a very important role in the overall context of our proposal. As we have already observed, the licensure regime that has been in place since 1962 has had an impact on the CGAAO. Save for those of its members who were grandfathered in 1962, the CGAAO has been kept out of the realm of public accounting. While we propose that the CGAAO now be recognized as a licensing body, we are keenly aware that the Association lacks a nucleus of members who are experienced public accountants. We consider such a nucleus to be essential if the CGAAO is to perform its functions as a licensing body with full effectiveness. Furthermore, although a number of firms of Chartered Accountants have provided students and members of the CGAAO the opportunity to gain practical experience in public accounting, the CGAAO organization nevertheless needs a nucleus of member-practitioners to underwrite and expand this opportunity. We therefore propose that all current licensees who are neither C.A.’s nor R.I.A.’s be entitled to hold membership in, and public accounting licences from, the CGAAO.

In so proposing, we realize that we are confirming, and for that matter aggravating, the condition of the Institute of Accredited Public Accountants of Ontario as a dying organization. But we cannot in conscience propose that this organization whose membership, because of strictures that have been in place for almost two decades, has dwindled to 148, be revived. The IAPAO has served well by consistently questioning whether the effective monopoly of the ICAO was in the public interest. Its spokesmen made a major contribution to our knowledge of the history and problems of the accounting profession. We put it to the members of this organization that they are now in a position to contribute most positively to the interests of the public through licensed membership in the CGAAO. Accordingly, *we recommend that:*

- 6.6 All individuals who currently hold licences to practise public accounting in Ontario, but who are neither Chartered Accountants nor Registered Industrial Accountants, should be entitled**

as of right to membership in, and licences from, the Certified General Accountants Association of Ontario.

Bearing in mind that, under our proposal, the CGAAO, the ICAO, and the SMAO, as well as being licensing bodies in public accounting, are all reserved title organizations in accounting generally, individuals who qualify should be free to hold reserved titles in more than one of these organizations. However, no individual should be permitted to hold a public accounting licence from more than one organization, and no individual who has lost his licence as a result of disciplinary proceedings in one accounting organization should be permitted to be licensed by another. Therefore, *we recommend that:*

- 6.7 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should permit individuals who have the reserved title of any one of these organizations to hold the reserved title of either or both of the other organizations; but no individual should be permitted to hold a public accounting licence from more than one organization, and no organization should be permitted to issue a public accounting licence to any individual who has lost his or her licence as a result of the disciplinary proceedings of another organization.**

We now turn to the licensed scope of public accounting that we propose. For reasons already given, this scope should encompass statutory audits, voluntary audits, and non-audit reviews. This is somewhat easier said than done, but the legislative draftsman will receive initial guidance from section 1(c) of *The Public Accountancy Act*. In that the term “non-audit review” has an agreed-upon connotation among the professional accounting organizations, the draftsman may advisedly look to these bodies for assistance. Accordingly, *we recommend that:*

- 6.8 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should define the scope of the public accounting licence in such a manner that it encompasses audits and non-audit reviews.**

There are certain Ontario statutes which require audits of private sector entities whose activities are subject to special governmental regulation, or who are recipients of public funds or tax advantages.¹⁴ Audit requirements for such entities exist to protect remote users of financial information as well as government. Statutory requirements for audits of loan and trust companies and certain charitable organizations, for example, are intended to provide depositors and contributors, in addition to government officials, with reliable financial information. In some instances, the statutes specify the qualifications of the auditor; in others, the approval of the accountant is left to the discretion of the official administering the statute.

There has been potential for conflicts between such statutes and the existing licensing system for public accountants. We understand that in practice, however, officials have had neither the occasion nor the inclination to approve unlicensed accountants and the potential conflict of statutes has remained just that. We believe that Ontario statutes that require audits should reflect the provisions of the licensing legislation. Rather than engage in a wholesale revision of existing statutory requirements, however, we would deem it sufficient if the licensing legislation we propose stipulates that, notwithstanding any Ontario statute to the contrary, only licensees may perform public accounting functions.

We also observe that there exist a number of federal statutes with audit requirements.¹⁵ Some of these statutes specifically allow audits to be performed by persons other than provincially licensed auditors. Again, there exist both federal and provincial statutes requiring audits of units of the executive branch of government in enforcing the financial accountability of the executive to the legislature. At the federal level in Canada, the Auditor General is authorized to perform such audits; his provincial counterpart is the Provincial Auditor. We believe that the licensing legislation we propose should avoid conflict with federal legislation generally and

¹⁴See, for example, *The Loan and Trust Corporations Act*, R.S.O. 1970, c. 254, ss. 1(a), 73, 74, 75, and 168; and *The Cancer Act*, R.S.O. 1970, c. 55, ss. 11, 12, 26, and 27.

¹⁵The major statutes are: the *Canada Corporations Act*, R.S.C. 1970, C-32, ss. 130 and 132; the *Canada Business Corporations Act*, S.C. 1974-75, c. 33, ss. 149(1)(b), 154, and 156; the *Corporations and Labour Unions Returns Act*, R.S.C. 1970, C-31, s. 11(3); the *Trust Companies Act*, R.S.C. 1970, T-16, s. 48; the *Loan Companies Act*, R.S.C. 1970, L-12, s. 58; the *Bank Act*, R.S.C. 1970, B-1, s. 63; and the *Investment Companies Act*, S.C. 1970-71-72, c. 33, s. 6.

also with both federal and provincial statutes that enable audits of public authorities to be carried out by employees of public authorities, whether they are licensed or not. Accordingly, *we recommend that:*

6.9 The licensing legislation in public accounting should stipulate that, notwithstanding any Ontario statute to the contrary, only licensees may perform public accounting functions, and should exempt the following from its requirements:

- (a) accounting or auditing services performed by employees of public authorities under enabling federal or provincial statutes; and
- (b) accounting or auditing services performed in respect of organizations incorporated under a federal statute, where the statute specifically allows auditing services to be performed by someone other than a provincially licensed auditor.

In governing the scope of licensed practice in public accounting, the legislation we propose should reflect the fact that non-licensed accountants, in the course of their practice, may associate themselves with financial information in different ways. Section 34 of *The Public Accountancy Act* permits persons to issue statements, opinions, reports, or certificates in connection with such practice. We believe that the current legislation is too restrictive in one respect and too relaxed in another.

It is too restrictive in that it appears to stipulate that persons who issue such statements or reports must identify themselves as a particular kind of accountant; for example, an industrial accountant or cost accountant. In enforcing the scope of the current public accounting licence, it appears that the Public Accountants Council has, from time to time, challenged the right of individuals to call themselves simply “accountants,” or to list themselves as accountants in the Yellow Pages of the telephone directory. We consider such challenges a waste of regulatory resources which involves undue harassment of individuals who wish to practise outside the licensed realm of accounting.

On the other hand, we consider it most important for the protection of the public that any individual, other than a full-time

salaried employee performing accounting services for his employer, who associates himself for reward with financial information, should be required by law to accompany this information with a disclaimer clause. Both the ICAO and the SMAO submitted model disclaimer clauses in their final submissions to us. To illustrate, the disclaimer favoured by the SMAO reads as follows:

TO THE MANAGEMENT

The accompanying report(s) has (have) been prepared at your request and is (are) intended for your use only in planning and controlling the operations of your organization (or for your use relative to the affairs of XYZ*). I (we) have not performed an audit or review directed to the purpose of providing any independent opinion as to the correctness, fairness or credibility of the financial accounting records or financial statements of your organization and no representation should be made that I (we) assume any such responsibility.

(A statement indicating the specific purpose for which the report has been prepared may be included in a paragraph following this disclaimer of independent opinion.)

Signature of Preparer

*another organization to which the report relates¹⁶

We consider it most advisable for the protection of the public that the licensing legislation we propose should require individuals who issue statements, opinions, reports, or certificates that lie outside the scope of licensed practice to accompany these statements with a disclaimer. Therefore, *we recommend that:*

6.10 The licensing legislation in public accounting should not restrict the use of the general term “accountant,” but should stipulate that any person, other than a full-time salaried employee performing accounting services for his or her employer who issues for reward statements, opinions, reports, or certificates that lie outside the scope of licensed practice, shall accompany such statements, opinions, reports, or certificates with a signed disclaimer whose format is prescribed by law; failure to comply with this requirement should constitute a summary offence.

¹⁶Society of Management Accountants of Ontario, Brief to the Professional Organizations Committee, April, 1979, p. 4.

The basic rationale for a licensure regime is the protection of the public. Fundamental to the credibility that a public accountant lends to financial information are the accounting principles and auditing standards which he applies. These should be, and are, nationwide. In the development of these principles and standards in Canada, the Canadian Institute of Chartered Accountants is without question pre-eminent. The CGAAO and the SMAO, both of whose national counterparts are represented on the CICA Research Committee, accept these principles and standards as appropriate. By regulation under the *Canada Business Corporations Act*, the financial statements required of federally incorporated companies "must be prepared in accordance with the recommendations of the Canadian Institute of Chartered Accountants set out in the CICA Handbook."¹⁷

We deem it most important that the licensing legislation we propose should reinforce the importance of adhering to CICA principles and standards. This legislation should stipulate that failure to adhere to the recommendations set out in the CICA Handbook shall constitute *prima facie* evidence of professional misconduct or incompetence for purposes of disciplinary sanctions. It should provide as well that such failure is to be taken by the courts as *prima facie* evidence of negligence in civil liability actions. Accordingly, *we recommend that:*

6.11 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should stipulate that the failure of a licensee to adhere to the recommendations of the Canadian Institute of Chartered Accountants, as set out in its Handbook, shall constitute *prima facie* evidence of professional misconduct or incompetence for purposes of disciplinary sanctions, and that such failure is to be taken by the courts as *prima facie* evidence of negligence in civil liability actions.

Mandated adherence to accounting principles and auditing standards, in our view, does not afford sufficient protection to the public. Equally important are the integrity and the skill with which an accountant applies these principles and standards. Codes of ethics

¹⁷Regulations made under the *Canada Business Corporations Act* (S.C. 1974-75, c. 33), Order-in-Council P.C. 1975-2820, as am. P.C. 1976-1152, s. 44.

are fundamental in this respect, and under our recommendations the codes of ethics of each of the accounting organizations, like those of the licensing bodies in the other professions, will be subject to ministerial review and Lieutenant Governor in Council approval before they can be promulgated as regulations.

As well, however, education and practical experience play a major role. Under the current licensure regime, C.G.A.'s and C.G.A. students have had the opportunity of gaining practical experience in firms of Chartered Accountants, and this can be expected to continue. By recommending that current non-C.A. licensees should hold licensed membership in the CGAAO, we would endow that organization with a nucleus of experienced public accountants who could expand this opportunity.

We remain mindful, however, that the fundamental basis of the CGAAO request for access to the licence in public accounting lies in the claim that this Association can provide preparation for a career in this field of practice that is the equivalent of that provided by any other organization. We have chosen to endorse this claim, not least because we view equivalence in training and uniformity in training as two very different things. But it is our considered opinion that, for the protection of the public, equivalence should be established by a common test. For this reason, we propose that no accounting organization should be permitted to award a public accounting licence unless the candidate for licensure has passed a common licensing examination. To administer this common examination, we propose the creation of a body that we would call the Public Accounting Licensing Admission Board. Therefore, *we recommend that:*

- 6.12 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should stipulate that no candidate for licensed practice in public accounting shall be licensed unless he or she has passed a common examination administered by the Public Accounting Licensing Admission Board.**

The Public Accounting Licensing Admission Board we propose should be given a statutory base. Always bearing in mind that we wish to approximate as closely as possible within accounting the model of a

self-governing profession, we would limit the Board to two functions. The first would be to administer a common examination in public accounting to candidates who have been presented by each of the CGAAO, the ICAO, and the SMAO. The second would be to advise the Minister responsible on the educational and practical training requirements prescribed by each of these bodies before they are submitted to the Lieutenant Governor in Council for promulgation as regulations. Accordingly, *we recommend that:*

6.13 There should be enacted a statute to be called “The Public Accounting Licensing Admission Board Act,” this Act to constitute a Board which would be empowered to:

- (a) administer a common examination to individuals who have been presented by each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario as candidates for the licence in public accounting; and**
- (b) advise the Minister responsible from time to time on the educational and training requirements in public accounting prescribed by each of these bodies before they are submitted to the Lieutenant Governor in Council for promulgation as regulations.**

We favour a composition of the Public Accounting Licensing Admission Board that would include representation from each of the three licensing bodies in public accounting, from each of the two post-secondary streams in the Ontario educational system, and from among users of financial information. To achieve this balance, we propose that in addition to the nominees of each licensing body, there be a nominee of the Chairman of the Council of Ontario Universities, a nominee of the Chairman of the Council of Regents for the Colleges of Applied Arts and Technology, and a nominee of the Chairman of the Ontario Securities Commission. The latter three nominees should be knowledgeable in finance, but should not be members of any of the three accounting organizations. The Chairman of the Board should be appointed by the Lieutenant Governor in Council and should likewise not be a member of any of the three accounting organizations. Consequently, *we recommend that:*

6.14 The Public Accounting Licensing Admission Board should be composed as follows:

- (a) a total of three members nominated respectively by each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario;
- (b) a total of three members who are knowledgeable in finance but who are not members of any of the three accounting organizations, nominated respectively by each of the Chairman of the Council of Ontario Universities, the Chairman of the Council of Regents for the Colleges of Applied Arts and Technology, and the Chairman of the Ontario Securities Commission; and
- (c) a chairman, who is not a member of any of the three accounting organizations, appointed by the Lieutenant Governor in Council.

We believe that thus composed, the Public Accounting Licensing Admission Board will possess the expertise and perspective needed to give knowledgeable advice on the different educational and practical training requirements proposed in public accounting by each of the three accounting organizations. Given its composition, the Board will also have access to individuals who possess the expertise to set and mark a common licensing examination. But an Ontario examination is decidedly not our preferred option. What we emphatically prefer would be that the common licensing examination be the Uniform Final Examination currently used by the Institute of Chartered Accountants of Ontario.

This examination is set and marked under a Board of Examiners which is a subcommittee of the Inter-Provincial Education Committee (IPEC). The Inter-Provincial Education Committee, and not the Canadian Institute of Chartered Accountants, is responsible for the Uniform Final Examination, thereby acknowledging the fact that admission to the reserved title of "Chartered Accountant" is in the hands of the provincial Institutes. These Institutes possess the formal right to examine candidates in eight of the ten Canadian provinces.

In the remaining two provinces, namely, Alberta and Saskatchewan, statutes provide for the existence of provincial Boards of Examiners which are independent of the provincial Institutes.

The current role of the Institute of Chartered Accountants of Ontario with respect to the Uniform Final Examination is as follows. Given its membership on the Inter-Provincial Education Committee, the ICAO reviews the questions that the Board of Examiners proposes and sends comments upon, or suggested changes in, the questions directly to the Board. The ICAO subsequently receives the printed examination papers from the Board and stages its own writing centres, notifies its candidates, and retains invigilators. It then sends the candidates' papers to the Board of Examiners for marking. The examinations are kept anonymous and marked by a national group of examiners who do not know the provincial origin of the candidates whose papers they are marking. At the end of the process, the ICAO is notified of the results of its candidates, approves the results, and informs the candidates.

Our greatly preferred option would be for the ICAO to transfer its current role with respect to the Uniform Final Examination to the Public Accounting Licensing Admission Board. We strongly believe that such a transfer should be negotiated rather than imposed. We permit ourselves to hope that the ICAO might accept an invitation to negotiate as acknowledgement of the pre-eminent position it occupies in the realm of public accounting. We believe that the negotiations need not involve surrender by the ICAO of any part of its current educational programme. This programme is capped by the four-week full-time School of Accountancy which screens ICAO students prior to writing the Uniform Final Examination.

We can think of no reason why the ICAO should not retain the School for its own candidates. How the other two accounting organizations choose to prepare their candidates should be for them to determine. As matters now stand, candidates from different Canadian provinces approach the Uniform Final Examination with a variety of preparations. Thus, for example, candidates from British Columbia take part-time courses from the B.C. Institute rather than attend a full-time 'school of accountancy.' Candidates from Quebec prepare through the universities and do not take courses from the Ordre des Comptables. Quite evidently, the Uniform Final Examination could be made available to the Public Accounting Licensing

Admission Board without disturbing the ICAO's educational programme. We conclude that the Attorney General should urge the ICAO to negotiate with the Public Accounting Licensing Admission Board with respect to the Uniform Final Examination, and accordingly, *we recommend that:*

- 6.15 The Attorney General should inform the Institute of Chartered Accountants of Ontario of the desirability of transferring its functions with respect to the Uniform Final Examination, including the task of representing Ontario on the Inter-Provincial Education Committee, to the Public Accounting Licensing Admission Board, and the Attorney General should invite the Institute to enter into negotiations with the Board to effect this transfer.**

In recommending negotiation, we do not mean to imply that agreement between the ICAO and the Board will prove to be easy and automatic. We do explicitly, however, place our faith in the desire of both parties to achieve a result that will not impose on Chartered Accountant students the burden of taking more than one final examination and that will respect interprovincial mobility in the accounting profession.

Chapter 7 Citizenship and Transfer Rules

A. Citizenship

None of the professional organizations in accounting or engineering imposes citizenship requirements as a condition of membership. However, *The Architects Act* requires a member of the Ontario Association of Architects to be a British subject or to take an oath of allegiance and declare his intention of becoming a British subject.¹ In the case of the legal profession, *The Law Society Act* requires that a member of the Law Society of Upper Canada be either a Canadian citizen or a British subject.² Recent amendments to the federal *Citizenship Act* provide that for the purposes of any law in force in Canada that refers to "British subject," such status shall hereafter be described either as Canadian citizen or citizen of the Commonwealth.³

We agree with the position taken both in the Staff Study⁴ and by the Royal Commission Inquiry into Civil Rights (the McRuer Report)⁵ that, in general, Canadian citizenship is not a relevant indicator of competence, care, or trustworthiness in a professional and should not therefore be a condition for obtaining a licence to practise as a professional in the province of Ontario. Like both the Staff Study and the McRuer Report, however, we take the view that Canadian citizenship should be required of all members of the governing councils of the professional organizations in accounting, architecture, engineering, and law which administer licensure regimes. As delegates of the Legislature, it is appropriate that the members of the governing bodies of these associations should possess similar qualifications in this respect to members of the Legislature. Given the citizenship requirements for membership in the Law Society of Upper Canada and the Ontario Association of Architects, the members of these governing bodies are so qualified. In engineering,

¹*The Architects Act*, R.S.O. 1970, c. 27, s. 5(1)(e). In revisions to *The Architects Act* proposed by the Ontario Association of Architects, this requirement would be removed. Ontario Association of Architects, Brief to the Professional Organizations Committee, July, 1977, "Draft of Revised 'Architects Act'."

²*The Law Society Act*, R.S.O. 1970, c. 238, s. 28(c).

³*The Citizenship Act*, S.C. 1974-75-76, c. 108, s. 31(2).

⁴Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), p. 245.

⁵Ontario, Royal Commission Inquiry into Civil Rights, *Report*, No. 1, Vol. 3 (Toronto: Queen's Printer, 1968), p. 1,176.

members of the Council of the Association of Professional Engineers of Ontario must be Canadian citizens or British subjects.⁶

While we consider that these principles (which were strongly supported in formal briefs and presentations at the public meetings we conducted) should generally govern the professions under review, special considerations apply in the case of the legal profession and call for an exception to these principles. Believing that the views expressed in the McRuer Report should prevail over those expressed in the Staff Study, we deem it appropriate for members of the legal profession in Ontario to be Canadian citizens. The legal profession has special responsibilities to the community which it serves to uphold its legal institutions and to promote the administration of justice by those institutions. To us, Canadian citizenship connotes a necessary and desirable commitment to our national institutions and traditions. Recent amendments to the *Citizenship Act* reduce, from five years to three years, the requisite residence period necessary for citizenship.⁷ In most cases, this will mean that foreign-born applicants for admission to membership in the legal profession who have been able to satisfy Ontario training or transfer requirements will not face major impediments to entry as a result of a citizenship requirement, given the period of residence that these requirements will normally entail. Accordingly, *we recommend that:*

- 7.1 Canadian citizenship should not be a requirement for membership in any of the self-regulating licensing bodies in accounting, architecture, or engineering, but should be required in order to practise law in Ontario.
- 7.2 The statutes establishing each of the self-regulating licensing bodies in accounting, architecture, engineering, and law should provide that all (professional and lay) members of the governing councils of these bodies should be Canadian citizens.

B. Transfer Rules

The rules which each professional body in Ontario applies to transfer applicants from other provinces of Canada, or from other

⁶*The Professional Engineers Act*, R.S.O. 1970, c. 366, s. 4.

⁷*The Citizenship Act*, S.C. 1974-75-76, c. 108, s. 5.

countries, must necessarily reflect both entry criteria relevant to the particular profession in question and also—especially in the case of foreign applicants—the need to relate the particular background of each applicant to these criteria. Thus, it is impossible to generalize across the four professions under review as to appropriate transfer rules.

To the extent that we feel equipped to make any judgements about the appropriateness of existing rules, it is our impression that the rules in place in each of the four professions at present are not obviously inappropriate in any major respect. In the case of accounting, architecture, and engineering, interprovincial mobility within each of these professions seems extremely high.

In the case of accounting, the existence of several accounting organizations, with different legal prerogatives in different provinces, means that while transfer within an organization across the country is quite easy, the same membership prerogatives do not exist in all provinces. This would remain the case, but to a much lesser extent than at present, under our recommendations in Chapter 6 for the regulation of public accounting in Ontario. Under the existing licensure regime, a Certified General Accountant (C.G.A.) who is qualified to practise public accounting in British Columbia is barred from such practice in Ontario. Under our proposal, a British Columbia C.G.A., upon moving to Ontario and transferring membership to the Certified General Accountants Association of Ontario, would be able to practise public accounting if he passed the common licensing examination and met the other requirements in public accounting that the Certified General Accountants Association of Ontario may stipulate by regulation.

In the case of the legal profession, lawyers qualified in other provinces of Canada can qualify to practise in Ontario upon satisfying some relatively modest requirements (pertaining to knowledge of Ontario statutes and procedures in the case of lawyers transferring from common law provinces, and knowledge of common law doctrine as well in the case of lawyers transferring from Quebec), provided that they have practised in their home province for at least three years. In order to maximize mobility, we would hope that the Law Society of Upper Canada would see fit to exercise some measure of discretion in the case of applicants with less than three years of post-admission experience with respect to waiving some or all of the articling period

requirement, and some parts of the teaching portion of the Bar Admission Course, where practical experience and formal training in the home province justifies such dispensations.

In the case of transfer rules applicable to foreign applicants, as far as we are able to judge, the professional bodies under review appear to handle this complex matter in a sensible and flexible fashion. Obviously, foreign applicants have widely varied backgrounds, and major and unavoidable problems arise in attempting to assess both formal and informal qualifications of these applicants when often very little may be known about conditions in the jurisdiction from which an applicant comes. In the cases of the Institute of Chartered Accountants of Ontario, the Association of Professional Engineers of Ontario, and the Ontario Association of Architects, national bodies with which the provincial bodies are affiliated assume a major role in the accreditation and evaluation of foreign qualifications and thus promote the application of relatively uniform policies within Canada with regard to foreign applicants.

In the case of the legal profession, substantial difficulties have persisted over the years in the handling of foreign applicants, in part because of the more jurisdiction-specific nature of the discipline. Policies have been left to be determined by the Law Societies in each province. At least in the case of Ontario, the Law Society of Upper Canada has delegated the responsibility of evaluating the qualifications of foreign applicants in large part to the deans of individual law schools who have been required to determine the amount of credit to be allowed towards a recognized Canadian LL.B. Obviously, with so decentralized a decision-making process, very little in the way of uniformity has existed in the status accorded to the qualifications of foreign applicants. Moreover, residence requirements imposed by universities have sometimes meant that foreign applicants with good credentials were required to undergo more formal training than their particular circumstances warranted in order to obtain a recognized Canadian LL.B.

Fortunately, a national evaluative programme, called the Joint Committee on Foreign Accreditation and administered by the Federation of Law Societies of Canada and the Canadian Law School Deans, has recently been set up and now evaluates the academic

qualifications of all foreign applicants for entry into the practice of law in all common law provinces of Canada. The Committee determines what formal deficiencies, if any, exist in an applicant's qualifications, and specifies what additional courses and/or examinations must be undertaken in order to meet these deficiencies. Once these requirements are met, the Committee will issue a Certificate of Equivalence, certifying to all provincial Law Societies that the applicant has the equivalent of a recognized Canadian LL.B., whether or not a university where additional work has been undertaken is prepared to grant such a degree.⁸ New regulations pursuant to *The Law Society Act* have been requested which, if approved, will give effect to this scheme in Ontario. We warmly welcome this development and see it as substantially redressing the inadequacies of the previous system. We note only that, as in the case of out-of-province applicants with less than three years of post-admission experience, the Law Society might well wish to exercise its discretion in individual cases to waive some or all of the articling period requirement, and parts of the teaching portion of the Bar Admission Course, in the case of foreign applicants with prior practical or formal experience of a relevant kind.

In conclusion, we note two general matters pertaining to transfer applicants. First, earlier in this Report, we proposed that any person refused admission to a professional organization should be entitled to a hearing by the Registration Committee of that professional organization, from which an appeal would lie, on questions of law or

⁸The Joint Committee on Foreign Accreditation has opened 214 files since May 8, 1978, and has made recommendations on 95 of those cases to date. As for the rest of the files, a few have not been pursued by the applicant; most others are incomplete with respect to the necessary documentation. The disposition of the 95 settled cases is as follows: in 18 cases, the Committee recommended no advanced standing in a Canadian law school. In 33 cases, the Committee recommended one year advanced standing (and, in a majority of these cases, the Committee recommended that first year law school be one of the two make-up years required). In 23 cases, the Committee recommended two years advanced standing. Finally, in the remaining 21 cases, the Committee recommended that it was prepared to certify the candidate as qualified to enter the Bar Admission Course provided that he pass one to three law school exams (e.g., constitutional law). Of these 21 candidates, only two candidates had satisfied this condition as of February, 1980. Professional Organizations Committee telephone interview with Professor John Kavanaugh, Secretary to the Joint Committee on Foreign Accreditation, February 21, 1980.

fact, to the courts.⁹ These rights would also apply to refused transfer applicants. Second, the suggestion was made to us in at least one brief that professional organizations could often do more than they have done hitherto to provide systematic and easily accessible information on their transfer policies.¹⁰ This would enable prospective foreign applicants to make at least preliminary judgements as to the transfer requirements they are likely to face on migrating, without burdensome inquiries being required in each individual case. This suggestion seems to us to be one to which professional organizations might usefully devote some attention.

⁹See Recommendation 2.10, above.

¹⁰East Indian Professional Club, Brief to the Professional Organizations Committee, April, 1979.

Chapter 8 Incorporation of Professional Practices

One of our terms of reference stipulated that we consider “the appropriateness of permitting members of [the accounting, architectural, engineering, and legal] professions to incorporate their practices.” The question of incorporation is a vexing one, raising as it does not only concerns about the effects of incorporation on the relations between professionals and their clients, their governing bodies, and allied workers and paraprofessionals, but also concerns about the tax implications of incorporation.

Let us first separate out the tax question from those regarding the nature of professional practices themselves. We do not consider that it is within our mandate to advise on tax policy. We must take the structure of the tax system, whatever it may be, as given. If professional firms are allowed to incorporate, whether or not they should qualify for the small business tax rate is a matter to be determined by the taxing authorities and is a matter about which we offer no comment. In arriving at our recommendations we have accordingly taken the position that we must be blind to their tax implications. We cannot countenance depriving professional firms of the right to incorporate to deny them tax advantages, nor can we recommend incorporation on the grounds that it might yield tax advantages to professionals. Our entire treatment of incorporation is, therefore, based solely on a consideration of the non-tax implications of incorporation of professional firms. Where these are judged to be on balance positive, incorporation should be permitted, and vice versa.

Our concern is therefore with the effects that incorporation of professional practices may have on clients, allied workers and paraprofessionals, and on the governing bodies of the professions, as well as on professionals themselves. We are concerned lest the professional relationship between a practitioner and his client be in any way compromised. Similarly, we consider it important that the ability of governing bodies to govern and discipline their members not be diminished by the existence of a “corporate veil.” On the other hand, we are cognizant of the fact that a corporate structure may facilitate good working relationships between professionals and their non-professional co-workers by giving the latter a stake in the successful operation of the professional firm through participation in its ownership. We recognize that incorporation may provide a convenient mechanism for the establishment of multidisciplinary professional firms. Finally, we are aware of the ways in which incorporation may

facilitate the conduct of professional practices. Let us consider some of these implications of incorporation in more detail.

The Staff Study discussed at some length a number of advantages and disadvantages to the operation of professional firms which might be associated with incorporation,¹ and each of the professions in turn commented in their briefs and oral presentations on the applicability of this analysis to their own practices.

Basically, the advantages of incorporation for professional practices cited in the Staff Study are as follows: formalization of decision-making structures; transferability of ownership interests; generation of capital; and facilitation of commercial dealings. Moreover, the Staff Study noted that incorporation may facilitate the creation and operation of multidisciplinary firms with innovative approaches to practice structure and service delivery.

On the other hand, several disadvantages of incorporation were also cited. In terms of the operation of the professional firm, incorporation creates some additional formation and administration costs; moreover, it may create some inflexibility in the organization and conduct of the firm's affairs. But these are relatively minor concerns. The major negative features of incorporation relate to the accountability and independence of the professional practitioner working within the context of an incorporated practice.

Fears have been expressed that the professional-client relationship might be diluted and the requirements of confidentiality compromised if an incorporated firm were the supplier of professional services rather than the individual practitioner. If limited liability incorporation were permitted, the client's right of redress through civil liability for professional negligence might also be compromised. Furthermore, concerns have been raised as to the possibility that incorporation might act as a barrier to effective control over the individual professional by his governing body.

¹Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), Chapter 12, especially pp. 354-364.

These are real and important concerns. They were reviewed and considered in 1967 by the Ontario Select Committee on Company Law (the Lawrence Committee).² That Committee, however, was satisfied that appropriate legislation could be framed to protect against the erosion of professional ethics and professional-client relationships. Moreover, in Alberta, provision has been made in the legislation permitting professional incorporation for the preservation of the traditional fiduciary and confidential nature of the relationship between a professional and his client.³

We too are convinced that legislative provisions can be enacted to safeguard the interests of both clients and governing bodies in dealing with incorporated professional practices. Aside from insisting that the ethical nature of the professional-client relationship be maintained even if the professional is carrying on his practice in a corporate form, two other protective provisions are necessary. First, to ensure that the interests of professional governing bodies are safeguarded, legislation could stipulate that incorporation does not create a veil behind which practitioners could hide from the regulatory and disciplinary action of their governing bodies. This could be done most effectively by requiring professional firms, as well as their individual professional members, to be licensed by the governing body. Second, to protect the client's right to redress in cases of professional malpractice, legislation could provide that shareholders in professional corporations have unlimited liability with respect to claims arising out of the provision of professional services, though they could enjoy limited liability with respect to the non-professional aspects of their business.

One further objection to professional incorporation concerns the independence of the professional in exercising his judgement. It has been suggested that beneficial ownership of professional firms by non-professionals might introduce inappropriate interests into the conduct

²Ontario, Select Committee on Company Law, *Interim Report* (Toronto: Queen's Printer, 1967), Paragraph 2.2.8, p. 20.

³Section 58 of *The Chartered Accountancy Act*, R.S.A. 1970, c. 42, as am. by *The Attorney General Statutes Amendment Act*, 1975 (No. 2), S.A. 1975, c. 44; section 118 of *The Legal Professions Act*, R.S.A. 1970, c. 203, as am. by *The Attorney General Statutes Amendment Act*, 1975 (No. 2), S.A. 1975, c. 44; and section 92 of *The Medical Profession Act*, S.A. 1975, c. 26, as am. by *The Attorney General Statutes Amendment Act*, 1975 (No. 2), S.A. 1975, c. 44.

of professional affairs. Implicit in this view is the belief that non-professional owners of professional firms may not share the professional's uncompromising commitment to the interests of clients and third parties and might instead exert pressures to promote the business interests of the firm. We are not prepared to make a judgement on this issue in general. Suffice it to say that in engineering, where beneficial ownership of professional firms by non-professionals has been permitted for some time, no negative effects on the independence of the individual practitioner have been demonstrated.

Our review of the advantages and disadvantages of incorporation leads us to the general conclusion that where it does not already exist, incorporation of professional firms should be permitted, and that the potential negative effects of such a change should be addressed through legislation and regulation. We stress that this involves merely a permissive approach to incorporation. Accordingly, *we recommend that:*

8.1 The current legal prohibitions on conducting professional practices in corporate form, where such appear in accounting, architecture, and law, should be removed.

In order to ensure that professional governing bodies retain adequate control over the conduct of members who carry out their practices in corporate form, a system of licensing firms as well as individuals should be put into place. In engineering, the practice of professional engineering in corporate form is contingent upon obtaining from the governing body a Certificate of Authorization; this, then, provides a mechanism for regulating the conduct of incorporated practice. Such a system could usefully be implemented in each of the other three professions: accounting, architecture, and law. We have already addressed this issue with respect to architecture in Recommendations 5.9, 5.10, and 5.12. It remains to provide for such a system in law and in accounting. Accordingly, *we recommend that:*

8.2 The statutes establishing each of the self-regulating licensing bodies in the accounting and legal professions should be amended to:

- (a) enable these bodies to issue Certificates of Authorization to corporations which are engaged in the provision of accounting or legal services respectively;

- (b) give these professional bodies the same powers over holders of Certificates of Authorization as are currently given to the Association of Professional Engineers of Ontario under sections 20, 24, 25, and 26 of *The Professional Engineers Act*; and
- (c) require professional firms to hold Certificates of Authorization in order to practise in corporate form.

One of the benefits associated with the incorporation of professional practices is the possibility of participation in the ownership of the firm by non-professional employees. We are, however, mindful of the importance of maintaining the independence of the professional in exercising his judgement on behalf of his client and the possible association between that independence and control of the professional firm. In our view, both of these objectives can be met by permitting *minority* ownership of professional corporations by non-professional employees of the firm. In the case of engineering firms, however, where the absence of beneficial ownership restrictions has not resulted in any discernible harm to professionals, clients, or third parties, we prefer not to disturb existing arrangements. Therefore, *we recommend that:*

8.3 Where professional firms in accounting, architecture, and law are incorporated, they should, with the exception of mixed architectural and engineering firms dealt with in Recommendation 5.12 in this Report, be subject to the statutory requirements that:

- (a) licensed members of each profession hold a majority of the shares and comprise a majority of the directors; and
- (b) the remaining shares and positions on the board of directors, if any, be held by *bona fide* full-time employees of the firm.

We must also ensure that incorporation of professional firms does not prejudice the interests of clients and third parties by insulating practitioners from actions arising out of negligence in the provision of professional services. This can best be done by restricting the limitation of corporate liability to non-professional

aspects of the firm's business. Such a provision was, in fact, recommended by the Lawrence Committee.⁴ Therefore, *we recommend that:*

- 8.4 Notwithstanding any provision to the contrary in any other Act, the statutes establishing the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that shareholders of a professional corporation should remain liable with respect to claims arising out of the provision of professional services as if the shareholders of the corporation, including non-professional shareholders, were carrying on the professional practice as a partnership or, where there is only one shareholder, as a sole proprietor.**

The implementation of this last recommendation may necessitate some revision to the corporate arrangements currently in place in engineering, where professional firms have been allowed to incorporate with limited liability in all respects for some time. We have discovered no evidence to suggest that clients or third parties have been damnified by this arrangement, but this experience in itself does not justify the absence of legal protection for these interests. Furthermore, since most consulting engineering firms, incorporated or not, currently carry liability insurance, the real impact of the suggested recommendation would, in most cases, involve little more than possible revisions to insurance coverage arrangements. However, it is clear that this change in the liability of professional engineering firms can apply only in the future and not to services provided under a different regulatory regime. Accordingly, *we recommend that:*

- 8.5 In the case of engineering practices already incorporated, the requirement that shareholders remain liable as if they were partners with respect to claims arising out of the provision of professional services should apply only to professional services provided after the date of the enactment of this provision.**

Finally, in order to preserve the traditional fiduciary and confidential nature of the relationship between a professional and his client where professional services are rendered through a corporation, *we recommend that:*

⁴See Select Committee on Company Law, *Interim Report, op. cit.* at n. 2, Paragraph 2.2.7, p. 19.

- 8.6 The statutes establishing the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the relationship between a professional corporation and its clients be subject to all applicable laws relating to the fiduciary, confidential, and ethical relationships between a professional and his or her client; and that the fiduciary, confidential, and ethical relationships between a professional and his or her client be, in turn, unaffected by the fact of incorporation.

Chapter 9 Continuing Competence

A. The Nature of the Issues

The self-regulating licensing regimes in the accounting, architectural, engineering, and legal professions confer exclusive rights to practise on individuals who have met the prescribed entry qualifications. Given an appropriate set of entry qualifications, the question then becomes, “Is this sufficient assurance to the public that only competently executed services will be rendered by service providers in these areas?” This is a question about which it is difficult to arrive at precise judgements, but several general observations can be made.

No system of regulation, either entry regulation, post-entry regulation, or some combination of the two, will ever be error-free in the sense that the public can expect never to encounter a competence problem. To design a regulatory system with this as its objective would entail huge administrative costs as well as very substantial indirect costs in terms of the reduction in availability of service providers.

Entry qualifications prescribed by licensure regimes are based on the premise that the quality of outcomes desired by clients (or third parties) from particular services can be ensured by regulating the quality of the persons providing those services. By specifying certain entry qualifications that must be satisfied by every person wishing to provide licensed services, the assumption is made that there will be a high correlation between prescribed training inputs and desired service outcomes. Obviously, in a number of cases, this assumption will not hold. This will be so for a number of reasons: for one, entry qualifications are likely only to capture some dimensions even of initial competence. For example, knowledge of the theoretical aspects of a discipline may be imperfectly evaluated. Similarly, on-the-job experience requirements may have been inadequately met, but satisfaction of them may not be amenable to very exact evaluation. Then too, even if entry qualifications fully capture all relevant dimensions of initial competence, they provide no assurance that this degree of competence will be maintained thereafter. Finally, even if entry qualifications fully capture all relevant aspects of initial competence, and even if all such aspects are maintained by a professional over time, this is no assurance in and of itself that the professional will bring his full competence to bear on every task which he at any time undertakes in his professional capacity.

Because of factors such as these, in professions where the vulnerability of second and third parties is judged to be such as to justify licensure, it is likely also to be the case that entry qualifications cannot be relied on as the only assurance of continuing professional competence. Thus, in this chapter, we turn to an evaluation of complementary strategies that might be pursued in a balanced regulatory framework designed to ensure reasonable standards of continuing competence.

In order to evaluate the appropriate roles of the various regulatory instruments that are available, an understanding of what is embraced by the concept of "competence" must be settled. Professor Barry Reiter, in a working paper prepared for us, states:

The range of components properly included within a definition of a professional's "continuing competence"—competence retained after entry into the profession and throughout its practice—might be narrowly or widely circumscribed. The narrowest view would limit inquiry to the question of whether or not the professional possesses the minimum level of knowledge or technical skill required of a person who performs the work that this professional has undertaken. Under the widest definition, a professional would be regarded as competent only if he or she had this minimum level of knowledge or skill and, as well, was habitually able to apply the knowledge or skill to advance the client's interests without deficiencies in performance. The wide definition would treat a professional as having performed in an incompetent manner, where, although possessed of the minimum knowledge or skill, the professional, in the course of executing professional duties:

- (a) failed to apply professional expertise properly to the client's engagement;
- (b) exhibited a disregard for the welfare of the client or of society generally;
- (c) was reckless;
- (d) was negligent;
- (e) was dilatory without excuse;
- (f) involved the client in unnecessary additional expense;
or
- (g) failed to communicate adequately with the client to ensure that the client was sufficiently apprised of the professional's progress or the client's situation generally.

The difference between the narrow and the wide definition is that between basic professional abilities and satisfactory performance of particular professional duties undertaken.¹

We are firmly of the view that the wide definition of competence should be the objective against which possible regulatory strategies are measured. It is little consolation to the client for whom services have been inadequately performed to learn that his particular service provider possessed the necessary technical skills envisaged by the narrow definition of competence, but failed to bring those skills to bear on the client's particular problem because of, for example, alcoholism, indolence, or poor office practices. From the client's point of view, the outcome is the same whether the professional lacked the skills in the first instance or possessed them, but failed to bring them to bear on the client's case. We note that our view is shared both by the English Royal Commission on Legal Services² and the New South Wales Law Reform Commission³ in recent reviews of the adequacy of mechanisms in the legal profession for ensuring professional standards in their respective jurisdictions. As the wide definition of competence suggests, incompetence may take quite a wide variety of forms. This in turn calls for a range of regulatory strategies; strategies which are responsive in a discriminating fashion to the widely varied forms of potential incompetence.

B. Civil Liability

In all professional dealings, the common law recognizes a legal obligation on the part of a service provider to adopt reasonable standards of care in the provision of professional services. The absence of such care will expose the provider to liability, either in contract or tort, at least to second parties and sometimes to third parties, with

¹Barry J. Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, Working Paper #11 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), pp. 1-2.

²England, Royal Commission on Legal Services, *Final Report*, Vol. One (London: Her Majesty's Stationery Office, Cmnd. 7648, 1979), pp. 342 and 351.

³New South Wales, Law Reform Commission, *Complaints, Discipline and Professional Standards*, Part 1, The Legal Profession Discussion Paper No. 2 (Sydney: Law Reform Commission, 1979), pp. 7 and 138.

respect to damage or injury suffered as a result of the provider's negligence. This form of sanction for incompetence is the oldest established response to problems of continuing professional competence. While other regulatory responses, such as disciplinary sanctions administered by the governing bodies of self-regulatory professions, have often ostensibly overshadowed the role played by civil liability as a form of competence incentive, that role should not be underestimated. Many improvements in professional standards prescribed by professional bodies are in part a response to concern over the exposure of members to adverse civil liability determinations. Similarly, a strengthening of the focus of the disciplinary apparatus of many professions on problems of incompetence, in addition to misconduct, has been prompted by similar concerns.

Civil liability as a competence incentive has several attractive characteristics. First, it keys on unsatisfactory outcomes from the provision of professional services, where these outcomes are the result of negligence in the provision of the services. By keying on outcomes, civil liability focuses upon the matter of ultimate interest for clients who have purchased professional services. This contrasts with regulatory strategies which attempt instead to prescribe given procedures for the provision of particular kinds of professional services (output regulation) or regulatory strategies designed to ensure that people entering a profession are able to meet certain entry requirements (input regulation). Second, civil liability is a decentralized form of standard-setting in that it involves individual (client or third party) enforcers and independent adjudicators (the courts); thus, no one body, professional or otherwise, has a monopoly on the standard-setting and enforcement function. Third, by confronting the service provider with the possibility of paying full compensation for any negligence in the provision of professional services, civil liability attempts to ensure that appropriate precautions will be taken by a provider to avoid these costs.

On the other hand, civil liability suffers from some serious disabilities in many contexts. The most important of these is that the system depends on victim initiation. In a number of professions, such as law, where there is a large and relatively unsophisticated household client sector, a system of competence enforcement which is predicated upon the ability of clients (or perhaps third parties) to make judgments on the quality of services received as a prelude to considering suit assumes away the very problem that has justified licensure in the

first place. In other words, if all clients (or third parties) possessed the degree of sophistication required to make reliable judgements as to the quality of services received as a prelude to suit in the event that those services were unsatisfactory, the case for any kind of professional regulation—other than civil liability—would disappear. Conceptually, therefore, the case for civil liability is easily overstated. At a more practical level, the civil liability system, because it proceeds on a case-by-case basis, is a very expensive and cumbersome method of establishing and enforcing standards of competence in a profession. It is also true that many forms of incompetence commonly complained about, such as slowness or failure to report frequently enough on the progress of a matter to a client, are not amenable to resolution through a civil liability mechanism predicated on proof of significant quantum of tangible damage. Even where tangible damage has occurred, in smaller transactions such as commonly occur, for example, in the legal services market, the amount at stake may well not justify a client investing the resources required to mount a law suit. In yet other instances, often the kinds of damage sustained by a client or third party as a result of professional negligence cannot be adequately compensated by money (e.g., death or injury in the case of a negligently designed building; unsatisfactory custody arrangements in a matrimonial dispute; unsatisfactory ordering of family affairs in the drafting of a will). In any event, in order to bring a successful civil liability suit, a client or third party will often require expert evidence as to the appropriate standards of care that should have been brought to bear on the matter. This will require the assistance and cooperation of other members of the same profession to which the defendant belongs. There may often be difficulties in securing this adverse professional testimony.

Applying these considerations to the four professional areas under review, it seems likely that civil liability will be relatively effective as a competence incentive in public accounting in those cases where second and third parties are few in number and relatively sophisticated, and the type of damage likely to be sustained by the negligent provision of accounting services can reasonably and readily be compensated in monetary terms. On the other hand, the system will be less than fully effective in accounting where widely diffused third party (e.g., investor) interests are involved. In this event, individual suit is likely to be inhibited by the costs entailed relative to the losses at issue. Collective action by aggrieved third parties as a class is procedurally very difficult under existing class action rules in Ontario.

In the cases of architecture and engineering, clients will often be sophisticated enough to make judgements as to the quality of services received and the stakes will typically be high enough to warrant the costs entailed in bringing a civil action. On the other hand, these factors will not necessarily hold for prejudiced third parties. Moreover, the damage sustained by the negligent provision of architectural or engineering services will not always be easily compensable by a monetary award. In the case of law, the problem of victim initiation is particularly acute. In addition, often the damages sustained will not be readily compensable by a monetary award, nor will the size of the losses at issue or the type of conduct complained about often lend themselves to effective prosecution through the civil liability mechanism.

Two specific sets of issues have come to our attention in the civil liability context which call for comment on our part.

B.1 Insurance Arrangements

Among the four professions under review, only the legal profession imposes a mandatory errors and omissions insurance requirement as a condition of the right to practise. In the other three professions, group insurance policies are sponsored by the professional bodies in question, but participation in these plans is not compulsory. Should this continue to be the case?

On the one hand, certain advantages obviously flow from mandatory errors and omissions insurance. First, a client or third party who sues a negligent professional has greater assurance that a meritorious claim will be met. Second, the existence of mandatory insurance can provide the governing body of a profession with improved data on problem areas within the profession and on individual practitioners whose continuing competence might call for a review by the professional body as part, perhaps, of its disciplinary process.

On the other hand, a professional who is fully insured against all costs of errors and omissions is insulated to a large extent from the competence incentive effects of the civil liability system. Another set of problems may arise from the fact that an insurance carrier, in exercising its discretion as to whether to provide or withhold coverage, is thereby in large part indirectly determining which professionals

should be licensed (a function delegated ostensibly to the professional body in question). Finally, the professions have reported to us considerable difficulty in negotiating either compulsory or voluntary group insurance arrangements with carriers. Without the confidence that the private insurance market would be able to service, on reasonable terms, the insurance needs of members of a profession which has imposed a mandatory insurance requirement, we are unable to endorse any such proposal at the present time.

In these circumstances, we can probably do no more than observe that in a well-ordered world, all members of a profession who are in private practice would carry errors and omissions insurance; this insurance would carry substantial uninsurable deductibles and would involve experience rating in order to preserve some of the competence incentive effects of the civil liability system; governing bodies of the professions would have access both to aggregate and individual claims data. In addition, professional bodies might well be co-insurers with private carriers for some portion of the required insurance coverage in order to enhance organizational incentives to police competence problems seriously.⁴ However, given the uncertainty surrounding the future willingness of private insurance markets to continue underwriting professional insurance policies, and the terms on which they might be willing to do so, we feel unable to elevate these observations to the status of formal recommendations.

B.2 Limitation Periods

A good deal of confusion currently surrounds the question of limitation periods governing civil liability actions against professionals in Ontario.⁵ Much of this confusion derives from the possibility, in many contexts, of framing such an action either in tort or contract. The general limitation period for actions in either contract or tort is six years. But, in contract actions, time begins to run from when the contract is breached (i.e., from when the negligent services were provided). In tort actions, however, time often begins to run from when the injury materializes.

⁴For a thorough recent review of many issues pertaining to professional liability insurance, see New South Wales, Law Reform Commission, *Professional Indemnity Insurance*, The Legal Profession Discussion Paper No. 3 (Advance Copy, 1979).

⁵See Edward P. Belobaba, *Civil Liability as a Professional Competence Incentive*, Working Paper #9 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979).

In the case of civil liability actions against professionals, whether framed in contract or tort, two considerations need to be balanced. On the one hand, an aggrieved client or third party should not be prevented from bringing a suit if the nature of the professional's default was such that it was not reasonably discoverable for some time after the delivery of the services in question. In many cases, clients or third parties may face the problem of the "hidden cause of action." For example, a negligently executed title search may not show up until the client comes to resell his house; hazards in a negligently designed dam or building may not show up until years after completion of the structure. On the other hand, to leave the time period within which a professional may be sued for negligence entirely open-ended creates real difficulties for professionals in preserving records and maintaining insurance coverage, perhaps long after retirement from active practice. As has been recently noted, an unduly long maximum time period presents evidentiary problems for potential defendants:

. . . the passage of time makes evidence increasingly difficult and sometimes impossible to obtain, and where evidence is under the control of potential defendants, there comes a time when they should no longer be required to preserve it in order to meet possible claims.⁶

Problems such as these have led to a number of proposals for reform of the law governing limitation of actions. The most recent of these in Ontario, and the most comprehensive, is the *Discussion Paper on the Proposed Limitations Act* published in September, 1977 by the Ontario Ministry of the Attorney General. This Discussion Paper contains a draft Act which we believe takes a practical and, for the most part, sound approach to the question of the principles and periods of limitation of actions as they apply to the area of professional negligence. The relevant sections are as follows:

3. (1) The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose,
 - (a) an action for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty . . .

⁶"Report of the Alberta Commissioners on Limitations," contained in Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting*, August, 1978, p. 189.

6. (3) Subsection 4 applies only to actions . . .

(c) for professional negligence . . .

6. (4) The running of time with respect to the limitation period fixed by this Act for an action to which this subsection applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know,

(a) the identity of the defendant;
and

(b) the facts upon which his action is founded . . .

8. (1) Subject to subsection 3 of section 3, but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6 or 7, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.⁷

It will be observed that section 3(1) fixes the limitation period for actions for damages resulting from the provision of professional services whether the liability arises from contract, tort, or statutory duty. The period is two years. The provisions of section 6(4) modify this general rule by providing for postponement in cases involving hidden causes of action. The section postpones the start of the running of time. Time does not begin to run until the claimant knows, or should have known, the identity of the defendant and the facts giving rise to the cause of action. Section 8 is a general provision which stipulates a maximum thirty-year limit beyond which no action can be brought.

While the general thrust of these proposed provisions seems well conceived, it is our opinion that the thirty-year time limit casts an undue burden upon those providing professional services, their insurers, and their legal advisers. It is obvious that such an unduly extended period could well have a serious effect on the cost of professional liability insurance. Accordingly, *we recommend that:*

⁷Ontario, Ministry of the Attorney General, *Discussion Paper on the Proposed Limitations Act* (Toronto: Ministry of the Attorney General, 1977), pp. 6, 12, 13, and 16.

- 9.1 The proposed provisions contained in the Ontario *Discussion Paper on the Proposed Limitations Act* should be adopted, subject to an amendment providing that the maximum time period of limitation applicable to professional negligence actions be ten years from the date on which the right to bring the action arises.

C. The Disciplinary Process

Each of the professional licensing bodies under review maintains a disciplinary mechanism pursuant to which the professional body can establish standards of professional conduct and impose sanctions for their breach.

In comparison to the civil liability system, the disciplinary process has some compelling features. First, a disciplinary body can bring a great deal of highly specialized expertise to bear on the development and enforcement of appropriate standards of conduct and performance in a profession. Second, because the ultimate sanctions available to a disciplinary body in a profession administering a licensure regime are suspension or revocation of licence, the prospect of severe economic consequences entailed for any professional who finds himself subject to such sanctions is likely to constitute a powerful incentive to members of the profession to adhere to appropriate standards of conduct and performance. In other words, the deterrent effects of these ultimate disciplinary sanctions may often be greater than the deterrent effects associated with the prospect of a civil liability suit. Third, in the event that the imposition of the ultimate disciplinary sanctions is found to be justified in particular cases, the delinquent professional is more effectively foreclosed from subjecting other clients or third parties in future to similar risks than is likely to be the case under the civil liability system.

Historically, however, the disciplinary process in many professions has been subject to some important limitations. First, the process is typically triggered by client or third party complaints. In professions such as law, with a large, relatively unsophisticated household client sector, this dependence on victim initiation with respect to complaints about the performance of professionals (as in the case of the civil liability system) substantially qualifies the effectiveness of the process. Complaints which are forthcoming may present a very inaccurate, or at least very fragmentary, picture of competence and

related problems in a profession. For example, a relatively high proportion of complaints lodged by clients of lawyers with the disciplinary machinery of The Law Society of Upper Canada relate to matters such as slowness or failure to report on a matter frequently enough, and relatively few relate to matters bearing on the technical competence of lawyers. To draw from this pattern of complaints the inference that competence problems in the legal profession relate primarily to slowness and regularity of reporting, but not to technical competence, would clearly be unjustified. While clients may perceive themselves as having some ability to make judgements about how long matters should take to process, and how often they would like progress reports on their case, they have very limited ability in many instances to make judgements on the technical competence of the tasks performed for them by their lawyers. This incapacity underlies the case for licensure in law. The problems associated with victim initiation of investigations into the technical competence of professionals are less acute in professions such as accounting, architecture, and engineering, where clients are more sophisticated than is often the case with clients dealing with the members of the legal profession. One implication of this, of course, is that both the civil liability system and the disciplinary process in these three professions are likely to work better than is the case in law, despite the greater need for the protection of vulnerable second (and third) parties in law.

Second, the disciplinary process in many professions has been primarily directed at various forms of professional misconduct rather than professional incompetence. Among the four professions under review, the Institute of Chartered Accountants of Ontario appears to assign the largest role to the disciplinary process in regulating professional competence; the Ontario Association of Architects and the Association of Professional Engineers of Ontario, a more modest role in this context; and until very recently, the Law Society of Upper Canada, almost no role at all.

Third, the sanctions associated with the disciplinary process have been extremely blunt. In the four professions under review, they essentially consist of either suspension or revocation of licence, or in some cases, formal reprimand. It will be clear from the wider definition of competence that we outlined at the beginning of this chapter that suspension or revocation of licence will often constitute entirely inappropriate responses to many of the kinds of incompetence implied by this definition.

Fourth, because the disciplinary process is administered by the profession whose members are subject to discipline by that process, there will sometimes be real or perceived grounds for believing that the process is less than objective in the way standards are developed and enforced. For example, there may be public perceptions that the process is directed excessively at competitive forms of professional behaviour, such as advertising, and insufficiently at problems of incompetence. Even where a complainant alleges conduct that is within the purview of the process, it may be perceived that feelings of professional collegiality inhibit its vigorous prosecution.

Despite these factors that have limited the effectiveness of the disciplinary process in the regulation of continuing professional competence in the past, we are convinced that, in the future, this process must and can play a central role in establishing and enforcing appropriate standards of professional competence. To this end, we make a number of recommendations.

We consider that all doubts should be removed as to whether incompetence—as well as misconduct—is within the ambit of the disciplinary process. Accordingly, *we recommend that:*

9.2 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should make clear that the disciplinary processes in each profession shall apply not only to professional misconduct, but also to professional incompetence.

The statutes should be further amended to clarify and amplify the investigatory powers of the disciplinary bodies in these professions. In particular, in order to reduce excessive dependence on victim initiation of complaints about competence, each professional body should be empowered to maintain a programme of practice inspections.

At the present time, the Institute of Chartered Accountants of Ontario maintains such a programme and may inspect a member's practice if complaints appear to warrant this form of scrutiny; a more ambitious programme is presently under consideration which envisages random inspections of members' practices without the "trigger"

of prior complaints.⁸ The Law Society of Upper Canada engages in a limited form of practice inspection with respect to “blitz” audits of lawyers’ trust accounts. However, it was pointed out to us in submissions that the legal status of even these present forms of practice inspection is not beyond doubt, and that if an expanded role is desired for practice inspections, the statutes governing the professions should clearly authorize them.

We see a role for practice inspections in several contexts. First, as in the case of the Law Society, there may be a need for practice inspections to focus on a very specific aspect of a professional’s practice, such as the management of clients’ money. Second, in a similar vein, there may be a need for practice inspection powers so that adherence to prescribed professional procedures can be monitored in a systematic fashion. For example, if in the accounting profession certain procedural standards are prescribed for valuing inventory, or if in the legal profession reminder systems must be maintained to avoid missed limitation periods in the bringing of civil suits, then a professional body may wish to mount a programme of random inspections of professional practices to ensure that these procedures are being followed. Third, if several complaints have been received by a disciplinary body against a particular member of that profession, the disciplinary body may well wish to invoke practice inspection powers to determine whether these are isolated complaints, which may call for one kind of disciplinary response, or whether they in fact betray a generalized problem in the member’s practice, which may call for a quite different disciplinary response. Fourth, it is conceivable that practice inspection powers could be invoked to mount a random inspection programme that was not triggered by any of the previous circumstances but entailed inspections of a professional’s files by employees or agents of the professional body in order to make general judgements on a professional’s competence.

We have serious doubts as to the wisdom of assigning this last role to a practice inspection programme, not only because such a

⁸Letter from Mr. D.A. Wilson, Executive Director of the Institute of Chartered Accountants of Ontario, to the Professional Organizations Committee, February 8, 1980; see also, Institute of Chartered Accountants of Ontario, *Check Mark*, Special Issue, “Practice Inspection,” January, 1980.

programme would be very expensive to administer, but also because it would probably be strongly resented by many members of a profession who would be subjected to open-ended and random scrutinies without cause or justification, and because it may well prove disruptive to trust relationships between professionals and their clients. However, the first three purposes that might be served by practice inspection programmes strike us as having great merit. We do not presume to be able to define an exact role or choice of emphasis within these three purposes for practice inspection programmes in each of the professions under review. However, the victim initiation problem, especially in the profession of law, dictates the generation of independent sources of information on professional competence and, thus, enhanced reliance on at least limited practice inspection programmes. Accordingly, *we recommend that:*

9.3 The regulation-making powers in the statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be amended to empower each of these professions to propose regulations providing for the implementation of practice inspection programmes and providing for the admissibility of evidence obtained pursuant thereto in disciplinary proceedings.

Adopting a wide definition of professional competence necessarily entails the provision of a wide range of possible sanctions that might be invoked by the disciplinary body in each profession to meet the exigencies of particular cases. For example, if a particular lawyer is technically competent but incapable of running an efficient office and thus has missed limitation periods in law suits that he is handling, it may not be appropriate that he be suspended from practice or disbarred, or that he be ordered to take refresher courses, but rather that he be required to practise under the supervision of, or in collaboration with, another lawyer.

To take another example, an engineer who has strayed beyond his particular field of competence to undertake professional tasks in some other area of engineering, and does so incompetently, might be required henceforth to limit his practice to areas where his competence is not in question. To take yet another example, a professional who has allowed his technical skills to depreciate and has not kept up with new learning in his field might be required to take refresher courses or even to submit himself to formal re-examination following some

period of educational upgrading. In this context, the Staff Study proposed that a wide range of disciplinary sanctions be placed at the disposal of the disciplinary bodies in each of the professions under review.⁹ This suggestion was generally well received by the professions, and we strongly recommend its adoption. Following closely the proposals of Professor Reiter¹⁰ and the authors of the Staff Study, as well as proposals by the New South Wales Law Reform Commission,¹¹ and recommendations by the English Royal Commission on Legal Services,¹² *we recommend that:*

9.4 In relation to professionals found guilty of disciplinary offences, disciplinary bodies should be empowered by statute to:

- (a) expel the professional;
- (b) suspend the professional from practice generally or from some field of practice;
- (c) suspend the professional from practice generally or from some field of practice, either until a specified course of studies has been completed, or until the professional has satisfied a disciplinary body of his or her competence generally or in a specified field of practice;
- (d) accept the professional's undertaking to limit his or her practice in lieu of suspension;
- (e) impose conditions on the professional's ability to practise generally or in any field (including conditions of practising under supervision; not engaging in sole practice; requiring periodic inspections by the disciplinary body or its delegate; or reporting to the body about specified matters);

⁹Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), p. 344.

¹⁰Reiter, *Discipline as a Means of Assuring Continuing Competence in the Professions*, *op. cit.* at n. 1, pp.44-45.

¹¹New South Wales, Law Reform Commission, *Complaints, Discipline and Professional Standards*, *op. cit.* at n. 3, pp.144.

¹²Royal Commission on Legal Services, *Final Report*, *op. cit.* at n. 2, pp. 348-349.

- (f) direct the professional to pass a particular course, or satisfy the disciplinary body of competence in practice generally or in a particular field within a specified time, or be suspended;
- (g) direct the professional to satisfy the disciplinary body that physical handicaps, mental handicaps, or problems caused by drugs or alcohol have been overcome (with suspension in aid);
- (h) order the professional to be reprimanded, admonished, or counselled;
- (i) revoke specialty or other competence designations (either temporarily or permanently);
- (j) impose a fine on the professional;
- (k) order repayment, waiver, or reduction of professional fees in respect of work that is the subject of disciplinary proceedings;
- (l) order publication of the professional's name incidentally to any of the foregoing orders; and
- (m) make such other or ancillary orders as may be appropriate or requisite.

The foregoing recommendation would substantially expand the focus and reach of the disciplinary processes in the professions under review. Some concern was expressed to us that if full-scale disciplinary hearings were required in every case of alleged incompetence, even where perhaps only a formal reprimand might be called for, the process would become overburdened. While there are difficulties in the way of designing informal disciplinary processes for more minor violations, given the requirements of *The Statutory Powers Procedures Act*¹³ and concepts of due process, we would expect that the much more flexible (and, in many cases, much less draconian) range of sanctions available would frequently lead to "negotiated" resolutions of disciplinary violations—in effect, guilty pleas and acceptance of appropriate

¹³S.O. 1971, c. 47.

sanctions (often short of the “economic death” implied by the traditional sanctions).

On a final matter pertaining to the effectiveness of the disciplinary process, we note again concerns as to the credibility and objectivity of a process administered by a profession whose members are subject to that process. Elsewhere in this Report, we recommend the institution of the Office of Lay Observer as an assurance to the public that there is some external check, and public reporting, on the effectiveness of the disciplinary processes in each profession.¹⁴

D. Periodic Re-examination and Mandatory Continuing Education

A prescription often proposed for problems of continuing competence in a profession is that every member of the profession be required to undertake on a continuing basis certain forms of educational activities and perhaps even be subjected to periodic formal re-examination of his qualifications to practise. We have carefully studied the case for general periodic re-examination and mandatory continuing education requirements, and we have decided to reject it for the following reasons.

As noted above, continuing education or re-examination may be appropriate forms of sanction in particular cases of incompetence that have been identified through the disciplinary processes of a profession. However, the suggestion that every member of a profession, whether or not there is any evidence that his competence is in question, must be required to devote time, energy, and resources to embarking upon prescribed educational courses or subjecting himself to formal re-examination, would entail huge costs both in administering such programmes, and indirectly in the time and effort that would be demanded of every member of a profession in complying with such requirements. We assume, and there is no evidence whatever to the contrary, that the overwhelming majority of members of the four professions we have been reviewing are competent, and that they fully respond to all kinds of incentives—economic, professional, and personal—to maintain that level of competence over time.

¹⁴See Recommendation 2.9, above.

Different members of a profession will maintain desired levels of competence in different ways. For example, some will rely heavily on reading professional journals and other technical reports and material. Others will rely heavily on interactions with other professionals, perhaps within their particular firm. Yet others may rely heavily on voluntary attendance at courses and conferences and the like, the sponsorship of which is, of course, an important function of professional bodies.

There is no single recipe for how a professional should maintain his professional competence over time. To *require* all members of the profession to take particular continuing education courses or to submit themselves to periodic re-examination as a condition of the right to practise when the evidence is that an overwhelming majority of them are already competent and of their own volition will, in various ways, maintain their competence, would seem to entail a gross misallocation of resources. From our point of view, a profession would be much better advised to devote some of those resources to identifying that small minority of cases where members do have competence problems and tailoring appropriate disciplinary responses to those problems on a case-by-case basis. Accordingly, *we recommend that:*

9.5 General periodic re-examination and mandatory education requirements should not be introduced.

Chapter 10 Professional Advertising

The question of professional advertising is not of major consequence in the accounting, architectural, and engineering professions. This same question, however, raises controversial and difficult issues in the legal profession. This is because there exists a large household market for legal services that makes mass media advertising possible. We begin this chapter by addressing briefly the matter of professional advertising in accounting, architecture, and engineering and then proceed to a detailed examination of the issues raised by advertising in law.

A. Advertising in the Accounting, Architectural, and Engineering Professions

In the cases of accounting, architecture, and engineering, for the most part the nature of the clientele involved precludes extensive reliance on mass media advertising. Advertising in these professions takes the form of professional solicitation through brochures and prospectuses that are addressed to a select and generally knowledgeable clientele. By and large, the rules in force in these three professions in Ontario appear to us to give a reasonably wide latitude for those forms of professional advertising and professional solicitation that might serve useful informational purposes in improving the professional-client matching process.

In accounting, we are pleased to note that the Institute of Chartered Accountants of Ontario is continuing to review its rules on advertising and solicitation with a view to liberalizing them to the extent that this is compatible with the need to protect the public against misrepresentation or deception. However, we share the concerns of the Director of Investigation and Research under the federal *Combines Investigation Act* that the proposed revisions may still be unduly restrictive with respect to frequency and prominence of advertisements and the media which may be utilized.¹

In the case of architecture, there are few specific restrictions on the use of advertising. However, a recent study of the architectural

¹Robert J. Bertrand, Q.C., Assistant Deputy Minister, federal Bureau of Competition Policy and Director of Investigation and Research, *Combines Investigation Act*, federal Department of Consumer and Corporate Affairs, Brief to the Professional Organizations Committee, April, 1979, p. 8.

profession in Canada, conducted for the Royal Architectural Institute of Canada and the federal Department of Industry, Trade and Commerce, noted restrictions on the ability of architects to market certain kinds of services (e.g., multidisciplinary services, design/build services) which, the study concluded, unnecessarily constrain the ability of architects to expand the market for their services.²

In the case of engineering, advertising rules are relatively permissive although, with respect to claims of special expertise, an engineer may hold himself out as a specialist only if he is so qualified by virtue of a formal specialty designation under the Association of Professional Engineers of Ontario's (APEO's) specialty designation programme which has been in force since 1972. The Staff Study noted a number of concerns with this programme, not the least of which was that there seems to be very limited demand by clients, employers, and engineers themselves for specialty designations, at least as reflected in the very small number of engineers who have sought or obtained such designations to date: as of the end of 1979, only 308 out of 45,000 members (about 0.7%) have qualified for specialty designations.³ The complex, resource-intensive, regulatory apparatus required on the part of the APEO to administer this programme, coupled with the potential danger that such a programme might balkanize the profession and introduce undesirable impediments to manpower mobility, raise some serious questions as to its value. However, we are content to leave the APEO to weigh these factors in determining the future of the programme.

Having recorded our reservations on the APEO specialist programme, we take due note of the fact that this profession is highly permissive with respect to almost any form of advertising. We have no evidence whatever that practitioners have taken undue advantage of the relaxed regulatory regime that is in place. We conclude that both the accounting and the architectural professions might therefore review the details of their advertising rules to determine whether these involve over-regulation relative to the position that obtains in engineering.

²See Peter Barnard Associates, *Canadian Architects Services: A Perspective and Considerations for the Future* (Ottawa: Royal Architectural Institute of Canada and the federal Department of Industry, Trade and Commerce, May, 1979) pp. 3-19.

³Letter from Mr. A.W. Wardell, Director of Legal and Professional Affairs for the Association of Professional Engineers of Ontario, to the Professional Organizations Committee, January 22, 1980.

B. Advertising in the Legal Profession

B.1 Defining the Public's Information Needs

The information problems that face prospective users of legal services arise first, in determining that they have a legal problem for which they require qualified assistance and second, in identifying an appropriate person to provide that qualified assistance. These information problems are clearly substantial and indeed provide the basic rationale for the existence of a licensure regime in law. However, even in the context of a licensure regime, a prospective client still will often lack the information required to identify an appropriate lawyer to handle his particular problem. The first aspect of a prospective client's information problems—difficulty in identifying a problem as a *legal* problem—raises much wider issues than lawyers' advertising and does not seem amenable to significant amelioration through individual or firm advertising by lawyers.

However, institutional advertising by the Law Society itself, designed to alert the public to circumstances in which it will often be desirable to obtain legal advice or assistance, may have a role to play in this context and raises no particular regulatory issues of concern to us. Nevertheless, two points bear noting in passing. First, evidence on the effectiveness of institutional advertising is mixed. For example, a recent large-budget institutional advertising campaign undertaken by the English Law Society is judged by some to have had a negligible impact on the public's awareness of circumstances in which there is a need to consult a lawyer.⁴ Second, the concept of institutional advertising, despite the warmth with which it has sometimes been embraced by professional governing bodies in recent debates over lawyers' advertising, does not address the question of lawyer selection once a matter has been identified as a problem requiring a lawyer's assistance and can in no way be a substitute for information that bears on the differing capacities of individual lawyers.

This second aspect of the information problem facing prospective clients—difficulty in identifying an appropriate lawyer to handle a particular problem—directly raises the issue of the extent to which

⁴Letter from Sir David Napley, Solicitor, Kingsley, Napley & Co., Solicitors, London, England, to the Professional Organizations Committee, October 23, 1979. Sir David is a former President of the English Law Society.

individual or firm advertising by lawyers is desirable. When we speak here of the choice of an "appropriate" lawyer, we recognize that a wide range of characteristics of lawyers may figure in the choice calculus of particular clients. This range encompasses such factors as honesty, geographic proximity, price, office hours, languages spoken, reputation, promptness, human qualities, etc. Ideally, a prospective client may wish to have reliable information on all of these kinds of characteristics of alternative service providers before choosing a particular lawyer. It is in this context that we weigh the possible contribution that lawyers' advertising might make to alleviating the information problems that beset prospective clients.

In order to bring a sharper focus to bear on the nature and extent of these information problems, it must be emphasized that large business clients, located predominantly in urban centres, appear to face no major information problems in making appropriate selections of lawyers for particular legal functions. Such clients tend to be repeat users of legal services and, over time, develop the experience required to be able to make appropriate lawyer selections and to assess, at least approximately, the quality of service being received. In addition, informal communications networks through professional, business, and social contacts appear to provide quite reliable information about firm and lawyer specialization.

A second client sector which appears not to face major information problems in choosing legal firms or lawyers appropriate to its needs includes individuals and small business clients residing in small- and medium-size Ontario towns. In this case, informal community information networks appear to be fairly efficient in disseminating information about the comparative quality and costs of available law firms and lawyers.

A third client sector, however, does appear to face significant information problems. This sector comprises individuals and small businesses located in large town or urban settings. The urban, small client sector lacks the benefit of the informal community networks that operate in small towns and the sophistication and experience possessed by large business clients.

We have isolated the urban, small client sector as the area where information about comparative qualities and prices of different law firms and lawyers is likely to be the most deficient. We also recognize

however that, relatively speaking, the complexity of the legal functions to be performed in this sector is generally not great. In this context, let us consider how advertising rules might best be framed to respond to the information problem so defined. We proceed by considering in turn non-price and price advertising.

B.2 Non-Price Advertising

With respect to non-price advertising, the Law Society of Upper Canada has historically applied very restrictive rules of professional conduct to the right of individual lawyers or law firms to advertise information on any of the service dimensions or characteristics cited above. In recent years, the Law Society has had under intermittent review various proposals for the institution of a formal specialty certification or accreditation programme, under which lawyers so certified or accredited would be permitted to advertise, in prescribed forums, areas of specialized expertise provided that the conditions and standards established by committees of the Law Society for each field of specialty had been met by any lawyer seeking so to advertise.

The passage of time has witnessed a gradual abandonment by the Law Society of any commitment to a full-scale specialty certification or accreditation programme and instead a re-orientation towards more permissive rules on advertising. We are, in general, very much in sympathy with this movement. As we have already suggested in the case of engineering, a specialty certification programme is almost certain to entail a complex, resource-intensive, regulatory apparatus that drains off the energies of many members of the profession from other roles that they might play in its governance.

Just as importantly, formal specialization creates serious dangers of balkanizing the professional field by fragmenting it into a series of narrowly defined functions, with regulatory structures set up with respect to each function to determine who qualifies for formal specialty recognition and who does not, with all the potential that this process carries for demarcation disputes between practitioners in adjacent fields of specialization, disputes over appropriate qualifications for obtaining specialty certification, etc. We would need to be confronted with much more substantial evidence than we have of massive information breakdowns in the legal services market for us to be persuaded that these dangers are worth running.

The programme recently introduced by the Law Society which permits lawyers to advertise, in the Yellow Pages and other print media, up to three preferred areas of practice on satisfying some relatively modest pre-conditions, the primary one of which is an obligation to undertake continuing education in each of the preferred areas of practice that are advertised, seems to us to be much more the measure of the problem.

However, we must note two reservations with respect to the new Ontario rules. First, we doubt the wisdom of requiring participation in continuing education activities as a condition for being permitted to advertise preferred areas of practice, given that such advertising entails no claim of specialized expertise.⁵

Second, the new rules focus largely on the ability of legal practitioners to advertise preferred areas of practice and not on a range of other kinds of information which may well be useful to prospective clients in making an informed lawyer selection. For example, we see no reason why a lawyer should not be able to advertise such information as office hours, languages spoken, educational qualifications, professional affiliations, representative clients (with consent), references, and publications, in addition to preferred areas of practice. We note that recent rule changes by the Manitoba, Alberta, and British Columbia Law Societies give lawyers in these provinces this freedom.⁶ We note also recommendations to similar effect by the English Royal Commission on Legal Services.⁷ In all cases other than Manitoba, such advertising is to be restricted to the print media. In short, while the new Ontario rules will have a very desirable liberalizing effect, in our view they do not go far enough and continue to over-regulate the members of the legal profession.

B.3 Price Advertising

With respect to price advertising by lawyers, the Law Society has been extremely restrictive. Historically, the position taken has been

⁵See our general recommendation on mandatory continuing education and re-examination in Chapter 9, Recommendation 9.5, above.

⁶See Law Society of Manitoba, Special Committee on Advertising by Lawyers, "Report," (mimeo., June, 1978); Law Society of Alberta, Professional Conduct Handbook, Revised Ruling 3 (mimeo., June, 1979); and Law Society of British Columbia, "To All Members of the Profession: Special Notice-Advertising," (mimeo., January, 1980).

⁷England, Royal Commission on Legal Services, *Final Report*, Vol. One (London: Her Majesty's Stationery Office, Cmnd. 7648, 1979), Recommendation 27.35, p. 371.

that lawyers are not permitted to advertise fees in any form, although a recent rule change will in future permit them to advertise their fees for an initial half-hour consultation. By contrast, recent rule changes in Manitoba, Alberta, and British Columbia now allow most forms of price advertising by lawyers.⁸ We note also that the English Royal Commission on Legal Services has recommended that such advertising be permitted.⁹ In all cases other than Manitoba, this is to be restricted to the print media.

The issue of price advertising in the legal profession has proven to be a very vexing subject of controversy over the past two or three years. The County of York Law Association frankly acknowledged to us in its final brief that its Board of Trustees was divided on the issue and could offer us no opinion.¹⁰ On the other hand, media editorials and consumer opinion surveys seem to indicate strong public support for more advertising freedom.

The controversy over price advertising received a substantial stimulus from the decision of the United States Supreme Court in *Bates v. The State Bar of Arizona*¹¹ in June of 1977 which invalidated restrictions on price advertising by lawyers imposed by the State Bar of Arizona as contravening the U.S. Bill of Rights, in particular the First Amendment guaranteeing freedom of speech. In Canada, public attention has been focused on the issue by an ongoing controversy in British Columbia involving an attempt by the Law Society of British Columbia to discipline several lawyers for advertising their fees for particular services.

A recent decision of the Supreme Court of British Columbia¹² has held the prohibitions on price advertising contained in the Rules of Conduct of the B.C. Law Society to be invalid as a violation of the federal *Combines Investigations Act*.¹³ In the B.C. case, the court held that only if the B.C. Legislature explicitly provided that price advertising should be prohibited, or if the Legislature explicitly permitted the Law Society to pass such a rule itself, would there be

⁸See n. 6, above.

⁹See n. 7, above.

¹⁰County of York Law Association, Brief to the Professional Organizations Committee, June, 1979, p. 10.

¹¹433 U.S. 350 (1977).

¹²*Jabour v. The Law Society of British Columbia and the Attorney General of British Columbia, The Restrictive Trade Practices Commission, and Robert J. Bertrand* (1979), 98 D.L.R. (3d) 442 (B.C.S.C.).

¹³S.C. 1974-75-76, c. 76.

immunity from the application of the *Combines Investigation Act*. This decision, if upheld, has clear implications for the status of existing rules of the Law Society of Upper Canada with respect to price advertising. As is the case with the B.C. *Legal Professions Act*, *The Law Society Act* in Ontario does not itself expressly prohibit price advertising by members of the Law Society, nor does it explicitly permit the Law Society itself to make such a rule. While the B.C. Supreme Court decision acknowledges that some regulation of advertising may be justifiable under the terms of the *Combines Investigation Act* where this may be necessary to ensure reasonable standards of competence, the legal status of price advertising by lawyers in Ontario remains uncertain.

In the absence of legislative amendment to *The Law Society Act*, the Law Society of Upper Canada may be in difficulty in maintaining its present rules in the face of the *Combines Investigation Act*. This then poses the issue of whether, in order to perpetuate the *status quo*, the Ontario Legislature should amend *The Law Society Act* to prohibit all forms of price advertising or to permit the Law Society to pass rules to this effect. We do not believe that a legislative amendment along these lines would be desirable. Nor do we believe that the present rules of the Law Society constitute an adequate approach to the problem.

There is much evidence that the quantity and quality of information about legal fees possessed by clients in the household sector is deficient. For example, in a Canadian Gallup Poll commissioned by the Canadian Bar Association in March and April of 1978, 63% of the respondents who had previously used a lawyer said that in relation to their last transaction involving a lawyer, they had not discussed fees with their lawyer. Of the 37% who had discussed fees with their lawyer at some point in their relationship, 54.5% discussed fees before engaging a lawyer, 32.6% before the bill was presented, and 11.7% after the bill was presented.¹⁴

Thus, a substantial majority of individuals who use lawyers' services appear to have little or no information about the likely cost

¹⁴The remaining 1.2% of the respondents either did not know or did not state exactly when they asked their lawyers about fees. See Canadian Gallup Poll, "Omnibus Study" conducted for the Canadian Bar Association, March and April, 1978, Questions 36A and 36B.

until after the bill is presented. The Canadian Gallup Poll also asked respondents, "What, if anything, do you think people who have used lawyers would be most likely to complain about?" Some 52% of the respondents said "overcharging," which ranked well ahead of the next most likely complaint which was "slowness" (22%). While it is possible for any client of a lawyer to have a bill taxed (i.e., reviewed) by a court official (a Taxing Master), this procedure itself involves costs, time, and formality, and its existence, at least until recently, was known only to a tiny fraction of users of lawyers' services.

We conclude from this that these information breakdowns with respect to the price of legal services have significantly impaired the competitive health of some segments of the legal services market by weakening the usual market constraints on pricing behaviour. As some evidence of this, Professor Barry Reiter has reported to us that commonly observed prices for conveyancing services of standard difficulty on a \$70,000 home purchase in Toronto run from \$200 to \$700 (a price dispersion of 350%); the full range of observed prices was \$150 to \$1,600.¹⁵

We propose several initiatives to mitigate this problem. First, the availability of the right of a client to have a bill of costs reviewed by a Taxing Master of the court should be much more widely publicized. We are pleased to note that in recent months the Law Society has begun to include a notice at the beginning of the Yellow Pages' listing of lawyers that includes a reference to this right. However, more than this seems needed, and any institutional advertising campaign that might be contemplated by the Law Society should include the publicizing of this service. Second, as we have recommended elsewhere in this Report, the Law Society, along with other professional bodies, should be permitted to undertake fee surveys and to publish widely the results therefrom.¹⁶ This will assist in providing members of the public with some set of benchmarks against which to relate and compare fees proposed in any particular transaction in which they have engaged a lawyer. Third, the Law Society should permit price advertising.

¹⁵See Barry J. Reiter and J. Robert S. Prichard, *Housing Transactions Costs in Canada* (a study for the federal Department of Consumer and Corporate Affairs, forthcoming, 1980).

¹⁶See Recommendation 11.1, below.

The U.S. experience in the two years since the decision on the *Bates* case is instructive. A survey of lawyers conducted for the *American Bar Association Journal* in April, 1979 found that only 7% of the lawyers polled had advertised since the decision.¹⁷ Three percent of the respondents said that in the next twelve months the likelihood of their using advertising was a virtual certainty; another 2% said it was probable; another 3% said it was a 50-50 chance; 39% said it was unlikely; 49% said they absolutely would not engage in any advertising; and 4% were not sure.

Of those who had advertised in 1978, 53% had advertised in the Yellow Pages, 40% in newspapers, 7% in magazines or journals, 7% on the radio, 7% in leaflets, 7% by direct mail, and 7% on billboards. None of the respondents reported using directories/programs or television. In June of 1978, the Manitoba Law Society liberalized its rules on advertising, including price advertising. Fifteen months later, in August, 1979, the Secretary of the Society informed us that he had noticed only five or six newspaper advertisements mentioning price, although more recently one law firm has begun running television advertisements identifying certain preferred areas of practice and offering an initial fifteen-minute consultation free.

The principal implication to be drawn from this experience is that lawyers' advertising seems highly unlikely to become a pervasive phenomenon in the legal services market. Thus, both those who portend catastrophe, and those who perceive enormous consumer benefits, should it be permitted, appear to be engaging in hyperbole. The inherently limited role of price advertising derives from two important factors. First, many categories of legal services are insufficiently standardized to permit a law firm to advertise a fixed price for them with confidence that variations in service complexity will be sufficiently small and predictable that a flat price can accurately capture them. Second, as many consumer surveys have shown, consumers of most professional services, including legal services, regard price as only one of a number of relevant selection criteria and by no means the most important one.

For these two reasons, few legal services will lend themselves effectively to a heavy emphasis on price advertising such as to attract

¹⁷(1979) 65 *American Bar Association Journal* 1,104.

the additional volume of business necessary to compensate for price reductions. Indeed, in many contexts, price advertising may prove counterproductive for a firm if consumers interpret this as a signal that the firm engaging in such advertising lacks the other professional qualities needed to attract and satisfy clients. These factors thus introduce powerful natural constraints on successful advertising in the legal services market.

Notwithstanding this, we believe that price advertising has a useful role to play in establishing accessible benchmarks by which consumers can develop and form judgements on what they are prepared to pay for certain types of legal services. Moreover, even if only a small number of lawyers choose to engage in price advertising, this margin may well be enough in certain service subsectors, such as residential conveyancing, that their presence will exert, over time, a generalized discipline on pricing behaviour throughout a service subsector.

The three most cogent objections that have been directed at price advertising are as follows. First, it is sometimes said that most forms of price advertising of legal services are misleading or deceptive in that it will rarely be clear in advance what service or services precisely are being offered for a stated fee or price. This concern seems legitimate to us and argues that the Law Society of Upper Canada should be permitted, and indeed encouraged, to evolve rules which attempt to define what is included in the more common services where these become the subject of price advertising. For example, perhaps a lawyer advertising "uncontested divorces" at a fixed fee should be required to stipulate whether the advertised services include, for example, obtaining custody, alimony, maintenance and property division orders. In addition, and more generally, misleading or deceptive advertising should be a form of professional misconduct and thus a ground for disciplinary action by the Law Society. We would as well recommend that the Ontario *Business Practices Act*¹⁸ should be amended to include professional services, so that willful acts of misrepresentation or deception will involve the commission of a criminal offence under this Act, just as they will under the misleading advertising provisions of the federal *Combines Investigations Act*. In

¹⁸S.O. 1974, c. 131.

this context, we note that the British Columbia *Trade Practices Act* now includes professional services.¹⁹

The second objection of substance often directed at price advertising is that it may, by putting pressure on professional incomes, increase the incentives of lawyers to reduce quality of service, particularly where quality reductions can be disguised from relatively unsophisticated clients. However, several factors should mitigate the force of this objection. First, price advertising is likely to remain viable only if sufficient service volume can be achieved to compensate for price reductions, and such service volume seems likely to be achieved and maintained only by a substantial ongoing investment by a firm in the goodwill it enjoys with its clients, present and prospective. Second, changes in internal management and organization of legal offices facilitated by increased service volume may actually lead to the enhancement of internal quality control mechanisms such as increased specialization, increased standardization, and more systematic supervision. For example, in a recent study published by the Law and Economics Center at the University of Miami,²⁰ it was found that the quality of service rendered by a heavily advertised multi-branch law firm in California compared favourably to the quality of similar services being provided to clients by more conventional private law firms, even though in some cases prices of services were less than 50% of the prices charged by traditional law firms. Third, the Law Society can choose to monitor, probably at a fairly modest cost, the performance of lawyers or law firms who choose to engage in price advertising, given their relatively high visibility and likely fewness in numbers. If quality problems prove to become significant in the case of firms engaging in price advertising, such firms might be brought within the purview of the practice inspection programme recommended elsewhere in this Report.²¹ Similarly, more attention might be given to standard-setting in the more routine service categories along the lines of several recent initiatives taken by the Law Society in establishing standards for real estate searches and reminder systems for limitation periods in civil litigation.

¹⁹British Columbia, *The Trade Practices Act*, S.B.C. 1974, c. 96, as am. S.B.C. 1975, c. 80, s. 1.

²⁰J. Muris and F. McChesney, "Advertising, Consumer Welfare, and the Quality of Legal Services: The Case of Legal Clinics," a Working Paper prepared for the Law and Economics Center, University of Miami School of Law, LEC Working Paper #78-5 (Miami: University of Miami, 1978).

²¹See Recommendation 9.3, above.

The third objection that has sometimes been directed at price advertising which may justify a response is that, in at least some cases, such advertising is unbecoming and undignified, and detrimental to public respect for the legal system. We can agree that in extreme cases of highly extravagant or flamboyant advertising, perhaps in the broadcast media, the public's faith in the integrity of the legal system might be impaired. However, this concern would seem largely taken care of by restricting, at least initially, price advertising and indeed other forms of advertising, to the print media and perhaps even then contemplating some prescriptions as to format, such as restricting all advertising to business or professional card format only.

Because our recommendations contemplate neither a complete prohibition on price or other forms of advertising nor completely unfettered freedom to engage in such advertising, we would much prefer that the Attorney General give the Law Society of Upper Canada the opportunity to come forward with revised Rules of Professional Conduct—which, by virtue of other recommendations in this Report, would henceforth take the form of regulations requiring Lieutenant Governor in Council approval²²—reflecting the spirit of these recommendations. In the event that the Law Society is unable or unwilling to bring forward such revised rules in a timely fashion, the Attorney General should take steps to secure appropriate amendments to *The Law Society Act*. On the basis of the considerations outlined above, *we recommend that:*

10.1 The Law Society of Upper Canada should bring forward to the Attorney General, in the form of regulations subject to Lieutenant Governor in Council approval, revised Rules of Professional Conduct providing that:

- (a) every member of the Law Society be entitled to advertise such information as office hours, languages spoken, educational qualifications, professional affiliations, preferred areas of practice, representative clients (with consent), references, publications, and fees charged for initial consultations, hourly rates, or fixed fees for services;

²²See Recommendation 2.14, above.

- (b) members advertising a service, where such advertising is misleading or deceptive, be subject to the professional misconduct provisions of *The Law Society Act* and be subject to disciplinary proceedings; and
- (c) price and non-price advertising by members be confined to the print media.

10.2 In the event that such revised rules are not forthcoming in a timely fashion, *The Law Society Act* should be amended to implement Recommendation 10.1.

10.3 *The Business Practices Act* should be amended to include professional services.

Chapter 11 Professional Fees

The determination of proper fees for professional services is a continuing, sensitive, complex, and important issue. Unlike many other goods and services, professional services are typically tailor-made to meet the needs of particular clients and are thus not readily comparable from case to case across a professional market. Non-standardized services mean non-standardized, and not easily comparable, prices. The consumer or client is often faced with major problems in obtaining reliable information about the comparative prices of alternative service providers. The professional, for his part, may face difficulties charging what his services are worth if he has difficulty in differentiating the quality of his services relative to the quality of services being offered by less skilled providers in the same market. He may thus face pressures either to reduce the quality of his own services or perhaps to leave this segment of the market and invest his energies elsewhere where his skills are more fully appreciated and highly valued.¹

In this chapter, we canvass a number of issues pertaining to professional fee determination: the role of fee schedules; the case for fees mediation or review mechanisms; the role of ethical rules in enhancing the provision of information on fees to clients and on the availability of fee review mechanisms where these exist; and finally, special payment mechanisms in the case of the legal profession, specifically contingent fee arrangements and prepaid legal service plans. We have dealt with the issue of price advertising in Chapter 10 of this Report.

A. Fee Schedules

Historically, many professions have promulgated minimum fee schedules for their members and have attempted to enforce them through disciplinary sanctions. In recent years, the enforcement of minimum fee schedules has tended to be either abandoned or relaxed, partly in response to amendments to the federal *Combines Investigation Act* in 1976,² which for the first time brought services, including professional services, within the ambit of Canada's anti-trust statute.

¹See Michael Spence, *Entry, Conduct and Regulation in Professional Markets*, Working Paper #2 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979).

²S.C. 1974-75-76, c. 76.

At the present time in the case of the four professions under review, neither *The Public Accountancy Act* nor the rules of the Institute of Chartered Accountants of Ontario provide for fee schedules of any kind, although until recently, fee surveys were periodically conducted by the Institute and the results distributed to members. Both the Ontario Association of Architects and the Association of Professional Engineers of Ontario publish suggested fee schedules, but these are not binding on members. Under the recently revised Rules of Professional Conduct of the Law Society of Upper Canada, Rule 10 provides that a lawyer should not undertake to act for, charge, or accept any fee which is not fully disclosed, fair, and reasonable. The official commentary on the Rule states that a fair and reasonable fee would depend upon and reflect such factors as “. . . fees authorized by statute or regulation, or a suggested fee schedule of a law association.”³ Many county law associations maintain suggested fee schedules for more common types of legal transactions.

Fee schedules present a number of problems. First, the individualized character of many professional services makes it very difficult to set uniform fee schedules for whole classes of services. Second, consistent and systematic enforcement of fee schedules is likely to be highly problematic given the wide variation in services offered and the large number of firms supplying services in most professional markets. Third, mandatory *minimum* fee schedules, if set by a profession itself, may well prove legally to be, or at least be publicly perceived to be, a form of price fixing. Fourth, to the extent that mandatory *maximum* or *fixed* fee schedules are seen as a means of regulating excessive prices, insuperable problems would be raised by the need to take account of variations in service complexity from case to case and the need to allocate, on an unavoidably arbitrary basis, general legal overheads to the provision of services that fall within the ambit of the fee schedule in order to cost those services. For these reasons, we fully share the views of the Office des Professions du Québec, in its recent study of professional fee regulation,⁴ that mandatory fee schedules—whether minimum, maximum, or fixed—are undesirable.

³Law Society of Upper Canada, Professional Conduct Handbook, Rule 10, Commentary 1(f), p. 28.

⁴Quebec, Office des Professions du Québec, *Professional Fees in Private Practice: The Question of Regulation* (Quebec: Bureau de l'Éditeur officiel, 1977).

On the other hand, we continue to be sensitive to the informational deficiencies concerning professional fees that exist to a greater or lesser extent in all of the professional markets with which we have been concerned. We believe that both practitioners (especially new entrants) and clients would find it to their advantage to have some systematic body of pricing information to which they could turn for guidance in professional dealings. We consider that the interests of all parties concerned would be well served by encouraging the undertaking of purely descriptive fee *surveys* and the wide dissemination both within a profession and to the public of the results therefrom. We emphasize that the results from such fee surveys should be purely descriptive, and not prescriptive, and that the information should be assembled by systematic and scientific survey procedures. To this end, *we recommend that:*

- 11.1 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be amended to provide, with respect to the regulation-making powers contained in each of these statutes, that regulations may be promulgated which enable the administration of fee surveys and the publication of the results therefrom.

B. Fee Disclosure

The above recommendation on fee surveys, and recommendations elsewhere in this Report on price advertising⁵ will, if implemented, ensure greater access in future by consumers to pricing information. In addition, we believe that the same end would be further served by each of the professional bodies under review adopting a rule of professional conduct which requires disclosure by a professional to a client of the basis on which fees will be determined before an engagement commences. As we note elsewhere in this Report, a recent consumer survey suggests that almost 65% of users of legal services do not discuss fees at all before engaging a lawyer.⁶ We appreciate that often it will not be possible for a professional to provide a precise estimate of the cost of a professional service before the service is embarked upon and before the relative complexities of the

⁵See Chapter 10, "Professional Advertising," above.

⁶*Ibid.*

client's problem are fully analyzed. However, while recognizing this, it seems to us not unreasonable to expect a professional to indicate the basis on which a final fee will ultimately be determined: for example, flat fee, percentage, hourly rate, and where possible, some broad orders of magnitude. A proposal in the Staff Study along these lines⁷ seemed to occasion professional bodies little difficulty in their final briefs, and we accordingly adopt the proposal. Therefore, *we recommend that:*

- 11.2 The Attorney General should advise the professional bodies under review of the desirability of adopting a rule of professional conduct requiring disclosure by a professional to a client of the basis on which fees will be determined before an engagement is undertaken.**

C. Fees Mediation Mechanisms

It is clear from research done for us that fees are a significant source of client complaints in the professions under review. By and large, the professional bodies concerned take the position that complaints of overcharging do not raise issues of professional misconduct and thus are not appropriately treated as a matter for possible disciplinary action. Rather, such complaints are a matter between the client and the professional whom he retained, to be settled if necessary by civil litigation.

We agree that the disciplinary process is not an appropriate instrument for dealing with complaints about professional fees. Both the formality of this process and the sanctions entailed are directed to cases of misconduct and incompetence and not to redressing cases of inappropriate fees. Nevertheless, we do not think that it is appropriate for professional bodies to eschew any concern whatever with this question, especially when one recognizes that complaints about fees and those about quality of services are often intertwined.

The Staff Study proposed that a fees mediation service should be provided by each profession. A client would be free to invoke this

⁷Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), Proposal 10.3, p. 322.

service if he wished, with members of the profession bound to participate in the review and bound also by its outcome. The Institute of Chartered Accountants now provides such a service, and the Ontario Association of Architects, through its Professional Conduct Committee, performs this function at present on an informal basis. In the case of law, Taxing Masters attached to court offices have jurisdiction to review legal fees. Again, the Staff Study proposal in this respect seems to have been widely accepted by most interested parties in their final briefs, although the Law Society of Upper Canada pointed out that given the existence of the present system of taxation of lawyers' fees, an additional fees mediation service operated by the Law Society would seem unnecessary. We accept this point. Accordingly, *we recommend that:*

11.3 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, and engineering professions should be amended to provide for a fees mediation mechanism.

In order for a fees mediation service to be fully effective, clients who have fees complaints must be aware of its existence. We would exhort the professional bodies under review to ensure that in institutional advertising material and the like, the public's attention is drawn to the existence of such a service. Beyond this, we endorse the proposal in the Staff Study that each professional body should adopt a rule of professional conduct requiring a professional to notify a client of fees mediation or review procedures available in cases where he is unable to resolve a fees complaint to the client's satisfaction. Therefore, *we recommend that:*

11.4 The Attorney General should advise the professional bodies under review of the desirability of adopting a rule of professional conduct requiring a professional to notify a client of the availability of fees mediation or review procedures in cases where the professional is unable to resolve a fees complaint to the client's satisfaction.

D. Special Payment Mechanisms in Law

D.1 Contingent Fees

Contingent fees are fees that a client need pay his lawyer only in the event of success in the litigation of the client's case. The Staff

Study addressed this matter and concluded that contingent fee arrangements as a means of financing civil litigation have certain attractions in improving middle class access to the legal system. Further submissions on this subject were invited, but those received were almost unanimously opposed to any attempt being made in Ontario to introduce contingent fees.

Professionals outside the legal profession expressed strong opposition to contingent fees. They argued that such a system would tend to encourage frivolous litigation, spawn dubious malpractice suits, make the cost of malpractice insurance horrendous, and increase the cost of legal services to those clients who would be engaging lawyers through normal retainers. The submissions of the Law Society of Upper Canada and the Ontario Branch of the Canadian Bar Association were more specific but equally opposed.

The brief of the Law Society of Upper Canada pointed out that a contingent fee system, such as exists at present in the United States, would work to the detriment of the client who, under such a system, signs away 35% to 40% of the recovery as opposed to the net recovery by clients in Ontario of something closer to 85% of the overall recovery, and rarely less than 75%. The brief of the Ontario Branch of the Canadian Bar Association stressed the further point that the contingent fee system is only relevant to a damage action and not to the multitude of other types of civil litigation. In addition, the brief pointed out that:

. . . not all claimants are meritorious by virtue of their poverty, nor are they deprived of their opportunity to take their claims to court. In this jurisdiction, people who have a meritorious claim and who are poor can always obtain legal aid. If the claim is meritorious enough, there is in practice what the Staff Study refers to as *de facto* contingent fees. If one is referring to the middle class as opposed to the poor, there are very few lawyers who would not conduct a meritorious case with a modest advance on account of disbursements. If a contingent fee system is designed to expand this *de facto* situation to cover the less meritorious cases, there would be a corresponding increase in the number of people exposed to non-meritorious cases . . .⁸

⁸Canadian Bar Association, Ontario Branch, Brief to the Professional Organizations Committee, April, 1979, p. 85.

An examination of experience in provinces which do have contingent fees coupled with a legal aid system demonstrates that the impact of the contingent fee system has been almost undetectable and the representatives of the legal profession therefore conclude that it seems futile to be engaged in an extensive debate about the merits of a topic which is of no practical interest.

Certainly we do not wish to prolong that debate; nor do we wish to suggest that we have made an exhaustive study of the subject. But we are concerned that we give our reasons for rejecting an invitation to support contingent fees as an additional method for payment of legal services in this jurisdiction. It is admittedly a well-established way of life in the United States, and six provinces of Canada permit contingent fee arrangements of one kind or another.⁹

We do not favour the seemingly current Canadian syndrome of attempting to find a Canadian problem for every American solution. It is not usually appreciated that the Anglo-Canadian experience in civil litigation is strikingly different from that pertaining in the United States on at least one vital point affecting contingent fees: in Ontario, the winning party in civil litigation typically will be awarded a substantial portion of his own legal costs from the losing party (party and party costs). In contrast, in the American system, each party typically bears his own legal costs irrespective of the outcome of the litigation. The result of this is that the plaintiff under the American contingency rules has nothing to lose if the action is dismissed. The unsuccessful plaintiff in Ontario, on the other hand, depending on the circumstances of the case, may be in jeopardy for the payment of substantial costs to the other party. This general rule would remain in place even if contingent fees were to be permitted.

In any event, the provincial jurisdictions in Canada that have legislated to permit contingent fees have done so in terms of providing

⁹These provinces are Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Quebec. The Northwest Territories also permits contingent fee arrangements. See generally, E. Lovekin, "The Contingent Fee," (1961) *Chitty's Law Journal* 97; W. Williston, "The Contingent Fee in Canada," (1967) 6 *Alberta Law Review* 184; A. Bulbullia, "Contingent Fee Contracts: Policy and Law in New Brunswick," (1971) 49 *Canadian Bar Review* 603; B. Arlidge, "Contingent Fees," (1974) 6 *Ottawa Law Review* 374; and L. Minish, "The Contingent Fee: A Re-examination," (1979) 10 *Manitoba Law Journal* 65. For a discussion of contingent fees in the United States, see F. MacKinnon, *Contingent Fees for Legal Services* (Chicago: Aldine Publishing Co., 1964).

safeguards from abuse that betray the serious concerns about their propriety in the first instance. The Nova Scotia *Civil Procedure Rules* are illustrative. The conditions they impose are strict. That fact in itself may reveal much. The contingent fee arrangement must be in writing, must be signed by the client, and must contain, *inter alia*, a statement of the contingency upon which the compensation is to be paid, and whether, and to what extent, the client is to be liable to pay compensation otherwise than from amounts collected by the solicitor. The arrangement must also provide that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed after deduction of all reasonable and proper disbursements.

The agreement must also contain a statement to the following effect:

This agreement may be reviewed by a taxing officer at the client's request, and may, either at the instance of the taxing officer or the client, be further reviewed by the court, and either the taxing officer or the court may vary, modify, or disallow the agreement.¹⁰

The review may be made at any time up until the expiry of six months from the date on which a solicitor received any part of his fee under the agreement. Added to these strictures, the Rules also invalidate any provision in an agreement purporting to provide that a proceeding cannot be abandoned, discontinued, or settled without the consent of the solicitor; that, notwithstanding anything to the contrary in an agreement, a client may change his solicitor before the conclusion of the retainer; and finally, that a copy of the agreement must be filed with the court. Apparently, it was felt that the device was so clearly open to abuse that stringent conditions permitting its use were required. The stringency of the conditions may in turn demonstrate why contingent fees are not used more frequently.

The legislation prohibiting contingent fees in Ontario is found in section 30 of *The Solicitors Act* which provides as follows:

Nothing in sections 18 and 35 gives validity to a purchase by a solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or

¹⁰Nova Scotia, *Civil Procedure Rules*, Rule 63.18(2)(f). See also Rules 63.16-63.21.

maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.¹¹

It should be noted that the Ontario position is more extreme than that evolved by the common law prohibition against champerty (the taking of remuneration in the form of a portion of the client's recovery) inasmuch as those arrangements by which a solicitor is to receive a non-percentage or block fee only in the event of success are also prohibited by *The Solicitors Act*.

The source of the possible abuses towards which both the common law and statutory prohibitions were and are directed is to be found in the fact that contingent fees offend the normal rules governing the special relationship that exists in law between a solicitor and his client. That relationship is one of complete good faith, openness in dealing with, and devotion to, the client's cause. The result of this trust or fiduciary relationship is that the lawyer must act in utmost good faith towards his client and indeed, is duty bound to disclose and disgorge any profit he makes from the relationship. He is duty bound to do his best for his client, consistent with his position as an officer of the court, which is a higher obligation.

This rationale for the principles governing fiduciary relationships has been expressed by Mr. Justice Cardozo in these eloquent words:

Many forms of conduct permissible in a workaday world for those acting at arms' length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd. It will not consciously be lowered by any judgment by this court.¹²

¹¹R.S.O. 1970, c. 441, s. 30.

¹²*Meinhard v. Salmon*, 249 N.H. 458, 164 N.E. 545 (1928).

It is neither difficult nor farfetched to imagine how the special trust relationship between lawyer and client may be subverted by any arrangement whereby the lawyer stipulates that his remuneration will be a share of the winning award. The contingent fee is a device which is clearly open to abuse because it has a tendency to encourage persons to begin, or to persist in the continued conduct of, suits of doubtful merit which might otherwise not be maintained; it can have a substantially deleterious effect on ethical standards by encouraging the waywardly-inclined to pursue personal gain by inflation of damages, suppression of evidence, or subornation of witnesses; it can distort supply conditions by the promotion of "ambulance chasing"; and it can seriously undermine the basic tenets of a service profession by equating the successful outcome of a particular piece of litigation with the successful practice of law. Accordingly, in order to emphasize our strong rejection of contingent fees as a payment mechanism in law, *we recommend that:*

- 11.5 There should be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario.**

D.2 Prepaid Legal Service Plans

The role of prepaid legal service plans in improving access to legal services is emerging as an important subject of attention both within and outside the legal profession in Canada. We are pleased to note that the Faculty of Law at the University of Windsor has recently set up a resource and research centre, called the Prepaid Legal Services Program of Canada, to disseminate information about available plans and to undertake research into various issues that they raise.

Prepaid legal service plans have been slower to evolve in Canada than elsewhere.¹³ Various forms of legal costs insurance, offered by independent carriers, have been widely used throughout Europe for many decades. In the United States, prepaid legal service plans, typically arranged through a group such as a labour union, have

¹³L. Wilson and C. Wydrzynski, "Prepaid Legal Services: Legal Representation for the Canadian Middle Class," (1978) 28 *University of Toronto Law Journal* 25. See also L. Wilson and B. Mazer, "Legal Fee Insurance Promises Equality," *Canadian Consumer*, September, 1979, p. 6; and L. Wilson and B. Mazer, "Prepaid Legal Services Come to Canada," Law Society of Upper Canada, *Gazette*, Vol. XII, No. 4 (December, 1978), p. 366.

grown dramatically in the last decade or so and are increasingly seen as a potential fringe benefit in employer-employee collective bargaining.¹⁴

In Canada, there are signs that a considerable growth in the utilization of prepaid legal service plans can be expected in the near future. The Prepaid Legal Services Program of Canada reports that legal insurance policies have been developed by several companies including the Citadel General Assurance Company, Green Shield Prepaid Services Incorporated, the Co-Operators Insurance Services, and the Gestas Corporation; the latter is acting on behalf of a consortium of thirteen insurance companies.¹⁵ We also note that in June of 1979, the Ontario Nurses Association adopted a self-funded legal benefit plan for members who might need legal assistance in disciplinary actions arising under *The Health Disciplines Act*. Plans vary with respect to coverage, options, and premium rates. The Co-Operators Insurance Services, for example, is offering a package to the United Grain Growers of Manitoba as a group plan for employees and retired employees of the company; members can subscribe for either basic or comprehensive coverage for specified classes of legal services up to given amounts each year. Payment is made through a small monthly premium which can be increased so as to cover a member's dependents as well. Co-Operators has also sold a plan to the Women's Conference Institute, a forum for women in management in Canada which features legal insurance as a membership benefit.

As of February, 1980, the provinces of Newfoundland, Nova Scotia, Quebec, and Saskatchewan allowed the sale of legal insurance policies.¹⁶ The delay in marketing policies elsewhere in Canada seems

¹⁴See, for example, Consumers' Union, "Paying Less for a Lawyer," *Consumer Report*, September, 1979, p. 522; and W. Pfennigstorf and S. Kimball, *Legal Service Plans: Approaches to Regulation* (Chicago: American Bar Foundation, 1977).

¹⁵Professional Organizations Committee telephone interview with Ms. Diana Majury, Executive Director of the Prepaid Legal Services Program of Canada, February 7, 1980.

¹⁶Professional Organizations Committee telephone interviews with Mr. Lucien Bergeron, Gestas Corporation, Ltd., February 11, 1980, and with Ms. Diana Majury, Executive Director of the Prepaid Legal Services Program of Canada, February 13, 1980. Interest in prepaid legal service plans has been cautious in some sectors thus far: for union employees, for example, this may be because of possible interpretations of the *Income Tax Act* that the employer's contributions to legal insurance plans would be a taxable benefit for the employee, and that the value of any legal services received by the plan member would also be taxed. See generally Ronald P. Miller, "Tax Implications of Prepaid Legal Services," Schedule C to the "Interim Report" of the Special Committee on Prepaid Legal Services of the Ontario Branch of the Canadian Bar Association (mimeo., 1975).

to rest on the need for rationalizing legal insurance within provincial insurance legislation: while some jurisdictions are willing simply to amend insurance licences so that legal insurance would be included in existing liability or casualty categories, other provinces anticipate legislating a new class of licence, such as "fee indemnity" to accommodate legal insurance. (The United Grain Growers plan is offered now only as a "rider" on property insurance policies; as of February, 1980, legal insurance could not be independently marketed in Manitoba.) We understand that the Government of Ontario currently has the matter of classification under study.

All the plans mentioned above are open-panel in the sense that a member of the plan can choose any lawyer he wishes to perform a legal service covered by the plan and is simply indemnified in accordance with the prescribed coverage schedules for the fees charged. In contrast, under a closed-panel plan, a number of which operate in the United States, a group member who is a subscriber is required to use one of the lawyers approved or employed by the plan administrators.

Prepaid legal service plans carry a number of potential advantages, depending on their type: (a) they allow for more rational budgeting of legal expenses by providing for risk and cost spreading among a group of consumers; (b) they may enable the reduction of service costs through greater production efficiencies made possible by, for example, larger service volume, greater specialization or routinization, and greater use of paralegal personnel; (c) they may improve the bargaining power of groups of consumers in retaining legal services; (d) they may facilitate more informed lawyer selection and thus improve the quality of legal services obtained; (e) they may facilitate the education of consumers about legal needs; and (f) they may facilitate a more preventive, rather than reactive, approach to legal problems.

On the other hand, a variety of potential problems have been identified with prepaid legal service plans: (a) lack of actuarial experience creates a danger that plans may be set up on a financially unsound basis; (b) cost containment may prove a difficult task with problems of adverse selection and over-utilization; (c) potential conflicts of interest may arise with the presence of a third party such as a group, employer, or plan administrator intervening in the relationship between lawyer and client; (d) controls may be necessary for ensuring the prudent administration of plan funds; and (e) a

reconciliation between proposed plans and existing requirements in our insurance laws may be necessary.

The organized legal profession in Canada has shown considerable interest in prepaid legal services. Thomas Walsh, Q.C., President of the Canadian Bar Association in 1978-79, stated recently that he considered the development of such plans in Canada to be a major priority for the legal profession.¹⁷ The Prepaid Legal Services Committee of the British Columbia Branch of the Canadian Bar Association has developed a model group plan for the guidance of interested parties.¹⁸

According to the Law Society of Upper Canada's final brief to us, Convocation approved the concept of prepaid legal service plans in 1972 and adopted the recommendations of its Prepaid Legal Costs Insurance Committee, as follows:

. . . the Superintendent of Insurance [should] be advised [that]:

1. The Law Society does not oppose the licensing of any insurance company which would offer Prepaid Legal Insurance but would request the opportunity to assist the Superintendent in the drafting of the required legislation and in the approval of the proposed form of policy.
2. We should like to establish certain guidelines for the coverage. Paramount among these is that the policy provide for complete freedom in the choice of lawyers by the insured and that the insurance company in no way be placed in a position whereby it may directly or indirectly recommend the services of any particular lawyer.
3. Any plan of Prepaid Legal Insurance must be administered in such a way that a solicitor acting thereunder would not in any way be in breach of the rulings of the Law Society.
4. The Law Society is prepared to offer the services of a special committee to work in liaison with the Department of Insurance to deal with problems which may arise from time to time with respect to the new insurance coverage.¹⁹

¹⁷Thomas Walsh, Q.C., Address to the National Conference on Prepaid Legal Services, October 19-20, 1979, *Proceedings* (Windsor: Prepaid Legal Services Program of Canada, 1980), p. 22.

¹⁸Canadian Bar Association, British Columbia Branch, "Report of the Prepaid Legal Services Committee," (mimeo., March, 1979).

¹⁹Law Society of Upper Canada, *Report of the Committee on Prepaid Legal Costs Insurance* (Toronto: Law Society of Upper Canada, 1972), quoted in Law Society of Upper Canada, Brief to the Professional Organizations Committee, April, 1979, p. 27.

In October, 1979, the Law Society's Special Committee on Prepaid Legal Services recommended to the Benchers that the Society not engage in advancing, underwriting, or marketing any plans; and that the Society inform the Superintendent of Insurance again of its opposition to closed-panel plans which "potentially raise professional conduct problems including steering, advertising, fee splitting, conflict of interest, unauthorized practice by corporations, the intervention of third parties in solicitor/client relationships and interference with the client's freedom of choice."²⁰

We ourselves cannot claim to have studied the subject of prepaid legal service plans in great detail in the course of our inquiry,²¹ but it seems appropriate that we offer some general observations. First, we think that the stance of the Law Society towards the development of prepaid legal service plans should be supportive, forward-looking, and flexible. Second, we think that the Law Society would be wise to avoid excessively restrictive regulation, based on too speculative an apprehension of possible public detriment, when this runs the risk of squeezing all the innovative potential out of the prepaid legal service plan concept. For example, we doubt that a sweeping prohibition of all forms of closed-panel plans can be justified, given the clear potential for cost and quality gains that well may be realizable through delivery modalities that are highly specialized to particular group needs (such as the provision of legal representation in Workmen's Compensation matters to employees of a common employer where these services are provided by lawyers hired as full-time employees of the group).

In Chapter 1, we counselled against the dangers of excessive regulation by professional bodies of their own members, and the high costs from reduced innovation that such a policy can engender. We consider that the task of structuring an appropriate regulatory environment in which prepaid legal service plans can realize their full potential should be undertaken with a sensitivity to the dangers of over-regulation.

²⁰See Law Society of Upper Canada, *Report of the Special Committee on Prepaid Legal Services*, (Toronto: Law Society of Upper Canada, 1979), pp. 3-4; this Report was adopted by Convocation on October 19, 1979, as reported in Law Society of Upper Canada, *Communiqué*, Number 93, October 19, 1979.

²¹But see Donald Milner, "Legal Service Plans," Internal Working Document prepared for the Professional Organizations Committee (1979).

Chapter 12 Employee Professionals

In three of the four professions under review (architecture, accounting, and engineering), a majority of professionals function as employees rather than as self-employed practitioners. Furthermore, the great majority of engineers and a substantial minority of architects and lawyers are employed as professionals by non-professional enterprises in the private sector and by government.¹

It has been submitted to us that these employee professionals (or at least those employed by business, industry, and government) constitute a distinct set of interests within the profession, interests which are not sufficiently recognized within the current structures of self-regulation. Employee professionals are under-represented on the councils of professional governing bodies, it is maintained; and codes of ethics and member services are directed largely towards conditions and concerns of self-employed practice.² It has indeed been suggested that the interests of employee professionals can be protected better within a collective bargaining organization than within a self-regulatory body.³

We have considerable sympathy with the concerns of employee professionals. The findings of the Staff Study lend support to the contention that such professionals are under-represented on professional governing councils.⁴ We believe, however, that the process of redressing these problems has already begun within the professions themselves. Voluntary organizations of employee professionals, particularly in engineering, are emerging to promote the interests of their membership vis à vis professional self-regulatory bodies and employers.⁵ While there is necessarily some lag between the changes in

¹Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), p. 378.

²David Beatty and Morley Gunderson, *The Employed Professional*, Working Paper #14 prepared for the Professional Organizations Committee, (Toronto: Ministry of the Attorney General, 1979), p. 67 ff.; Federation of Engineering and Scientific Associations, Briefs to the Professional Organizations Committee, January, 1977; and May, 1979, pp. 15-16.

³Beatty and Gunderson, *The Employed Professional*, *op. cit.* at n. 2., pp. 63-67.

⁴Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 1, pp. 196-212, *passim*.

⁵Federation of Engineering and Scientific Associations, *op. cit.* at n. 2; Canadian Society for Professional Engineers, Brief to the Professional Organizations Committee, May, 1979.

the demography of a profession and changes in regulatory structures and policies, we believe that evolutionary processes are underway to ensure that structures and policies will give greater weight to the interests of employee professionals. In this light, we would urge that professional bodies, in formulating regulations specifying professional composition of councils and committees, electoral procedures, and codes of ethics, be sensitive to issues of concern to employee professionals and seek to ensure that these concerns are taken into account.

The major issue before us relating to employee professionals, however, is the question of their right to bargain collectively with their employers. Self-regulatory bodies are established to protect, not primarily the interests of employee professionals or indeed professionals generally, but rather a balance of interests affected by the provision of professional services. It may be appropriate, then, to look to another mechanism for the promotion of at least certain of the interests of employee professionals—the mechanism of collective bargaining.

Professionals in the engineering, architectural, and legal professions in Ontario find themselves constrained, in either the public or the private sector or both, from engaging in collective bargaining. Since 1948, lawyers and architects (together with land surveyors, dentists, and physicians) have been precluded from membership in certifiable bargaining units under *The Labour Relations Act* of Ontario.⁶ Engineers were similarly precluded until 1970, when the Act was amended to remove their exclusion and to provide for bargaining units consisting solely of professional engineers, unless a majority desired to participate in a more broadly based unit. Other legal provisions for collective bargaining for licensed professionals in Ontario are summarized in the following excerpt from Katherine Swinton's working paper for the Professional Organizations Committee:

While professional engineers can organize in the private sector in businesses which fall within Ontario jurisdiction under the Constitution, they cannot do so in the public sector in Ontario. *The Crown Employees Collective Bargaining Act* specifically excludes engineers, along with certain other professions, from the definition of "employee." Employed accountants, not being mentioned in the exclusions in s. 1(3)(a) of the Ontario *Labour Relations Act*, can engage in collective bargaining.

⁶R.S.O. 1970, c. 232, as am. S.O. 1975, c. 76 and S.O. 1977, c. 31.

In contrast to the Ontario legislation is the labour legislation at the federal level, which is much more amenable to collective bargaining by salaried professionals. The *Canada Labour Code* applies to a "federal work, undertaking, or business," which brings within that Act activities subject to federal jurisdiction under the *British North America Act*. This would encompass broadcasting, interprovincial transportation, and banks, among others. The *Canada Labour Code* gives a broad definition to the term "professional employee" and makes provision for special bargaining units to include such professional employees. Similarly, professional employees in the federal public service are allowed to bargain collectively under the *Public Service Staff Relations Act*. That Act provides for certification of bargaining agents to represent various "occupational groups" within designated "occupational categories." One of these occupational categories is entitled "scientific and professional" and includes groups such as lawyers, engineers, architects and auditors.⁷

The basic rationale originally underlying the exclusion of certain professions from the provisions of labour relations legislation in Ontario appears to be the argument that professional employees stand in a fundamentally different relationship to their employers than do other categories of personnel and therefore would not fit comfortably within the framework of collective bargaining set out in these acts. The labour relations field, however, like that of professional regulation, is continually evolving and has reached a stage at which it can accommodate a wide range of employment contexts and categories of personnel. That this evolution has proceeded somewhat unevenly is evidenced by the disparities across professions, between the public and private sectors, and between the federal and provincial level, in the awarding of collective bargaining rights. We see no reason at this time to continue to deny to architects and lawyers in private sector enterprises under Ontario jurisdiction rights which they are granted under federal labour law, and rights which engineers and accountants enjoy under Ontario legislation. In the same vein, it appears reasonable to extend to engineers, lawyers, and architects in the Ontario public service the rights which they enjoy in the federal public service (and which, in principle, Ontario public service accountants are not denied).

⁷Katherine Swinton, *The Employed Professional*, Working Paper #13 prepared for the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1979), pp. 89-90. The relevant statutory citations are as follows: *The Crown Employees Collective Bargaining Act*, S.O. 1972, c. 67, s. 1(1)(g)(iv); the *Canada Labour Code*, S.C. 1972, c. 18, s. 107(i); and the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, s. 2.

We recognize that the extension of collective bargaining rights to architects, engineers, and lawyers in this way would have implications for other professions and would raise a number of issues requiring resolution. It is necessary to give considerable thought to the basis upon which collective bargaining rights would be accorded. The definition of managerial exclusions and, particularly in the private sector, the composition of bargaining units and the nature of terminal solutions, among other issues, must be resolved. Officials in the Ministry of Labour, the Ontario Labour Relations Board, and the Ontario Public Service Staff Relations Board would be called upon to resolve these issues as they have resolved similar issues in the evolution of collective bargaining in this province; and we are confident of their capacity and willingness to do so.

One issue, however, can be disposed of as a matter of principle at this point. Professional self-regulatory bodies must under no circumstances bargain collectively for their members; the regulatory body and the bargaining agent must be entirely distinct, as are the balances of interest which they respectively represent. This principle is so well-accepted as not to need elaboration here;⁸ our point is merely to add our emphasis and support.

In the light of all the above considerations, *we recommend that:*

- 12.1 In considering and formulating regulations regarding the composition of governing councils and statutory committees, electoral procedures, definitions of professional misconduct, and codes of ethics, the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should take due note of the concerns of employee professionals.
- 12.2 The provisions excluding architects and lawyers from collective bargaining under *The Labour Relations Act* and excluding engineers, architects, and lawyers from collective bargaining under *The Crown Employees Collective Bargaining Act* should be removed.
- 12.3 In no case should a professional self-regulating body be recognized as a bargaining agent for employee professionals.

⁸Swinton, *op. cit.* at n. 7, p. 121; Beatty and Gunderson, *op. cit.* at n. 2, p. 127 ff.; Law Society of Upper Canada, Brief to the Professional Organizations Committee, January, 1978, p. 28; Association of Professional Engineers of Ontario, Brief to the Professional Organizations Committee, November, 1977, p. 30; Canadian Institute of Chartered Accountants, Handbook, p. 74.

Chapter 13 Certification and Licensure Claims by Occupational Groups

A. Demands for Professional Status

Several elements of our terms of reference directed our attention to the question of the recognition of new professional groups in the four professional areas under review. For example, we were asked to consider “the possible creation of new professional groups and sub-groups or the amalgamation of groups within these professions” and “the need for recognition and definition of the roles of paraprofessionals . . . and the appropriateness of the possible creation of new governing bodies for these groups.”

As our work progressed, we became increasingly struck both by the number of occupational groups which came forward to make submissions to us seeking some form of legally recognized professional status and by the difficulties posed in evaluating such widely varied claims for special expertise and special status. We list below the twenty-two groups which approached us seeking enhanced professional status:

- (a) The American Institute of Cost Engineers
- (b) The Association of Certified Accountants (United Kingdom)/The Canadian Society of Certified Accountants
- (c) The Association of Certified Survey Technicians and Technologists of Ontario
- (d) The Association of The Chemical Profession of Ontario
- (e) The Association for Early Childhood Education, Ontario
- (f) The Association for Systems Management
- (g) The Canadian Association of Legal Secretaries
- (h) The Canadian Council for Professional Certification/The Ad Hoc Committee of Concerned Manufacturing Engineers
- (i) The Canadian Institute of Planners
- (j) The Canadian Society for Chemical and Biochemical Technology
- (k) The EDP Auditors Association, Toronto Area Chapter
- (l) The Group of Toronto Law Firm Librarians
- (m) The Institute of Chartered Engineers of Ontario
- (n) The Institute of Management Consultants of Ontario
- (o) The Interior Designers of Ontario
- (p) The Ontario Association of Landscape Architects
- (q) The Ontario Association of Professional Social Workers
- (r) The Ontario Building Officials Association

- (s) The Ontario Dental Hygienists' Association
- (t) The Ontario Institute of Quantity Surveyors
- (u) The Ontario Professional Foresters Association
- (v) The Purchasing Management Association of Canada

Obviously, many of the above groups were well outside our terms of reference; yet other groups could only be peripherally affected by our review of present regulatory arrangements in the four professional areas under study; still other groups were centrally affected by our inquiry. In the latter case we have, where appropriate in this Report, addressed ourselves to their claims. However, because the process of inquiry in which we were engaged, restricted though it was to only four professional areas, brought to the fore a veritable cornucopia of occupational groups seeking formal professional status—a phenomenon we suspect is at play in many other professional areas—we concluded that we would be remiss if we were to submit a report that did not address this phenomenon in a general way.

The factors that are fuelling the drive for professional credentialing in many quarters seem varied and subtle.¹ First, in an increasingly complex society, skills demanded for particular tasks become increasingly specialized, and this in turn leads to a proliferation of ever narrower and more specialized credentials. Second, as Douglas Wright has pointed out,² in the 1960's there developed an apparent consensus that equal opportunity could be obtained through education, and that education provided the kind of social escalator that benefited talent and endeavour. However, the resulting mass access to higher education undermined the near certainty of elite status once associated with university graduation and in many occupations shifted the search for such status to the devising of super-added professional credentials. Third, the development of a large-scale community college system in Ontario in the 1960's and 1970's, characterized by an enormous proliferation of courses and programmes of widely varying content and quality and unaccompanied by any general system of formal

¹See generally M.S. Larson, *The Rise of Professionalism* (California: University of California Press, 1977); H. Wilensky, "The Professionalization of Everyone," *American Journal of Sociology*, 70 (1964), 137.

²Douglas T. Wright, "The Objectives of Professional Education," in *The Professions and Public Policy*, eds. Philip Slayton and Michael J. Trebilcock (Toronto: University of Toronto Press, 1978).

degrees or credentials, again added to demands for the recognition of formal professional credentials conferred outside the educational system.

B. Responding to Demands for Professional Status

While one may be able to identify factors such as these as fuelling the demand for professional credentialling that we have observed in the course of our work, prescribing appropriate public policy responses to meet this demand is a good deal more difficult. A threshold problem is that the claims of the various professional and occupational groups that came to our attention are widely disparate. Some seek licensure; others, certification; and yet others are not clear what formal status they desire. As our experience in dealing with various groups in the course of our inquiry amply bears out, confusion abounds as to the differences between licensure (exclusive right to practise) and certification (reserved title). The distinction between the two regimes is worth reviewing in detail.

Licensure (exclusive right to practise) means a regulatory legal regime under which only persons holding a licence are legally entitled to perform any of the licensed functions, so that unlicensed persons, whatever their degree of competence or however exalted their formal qualifications, are in breach of the law if they attempt to perform any of these functions. In the four professional areas under study, the Ontario Association of Architects, the Association of Professional Engineers of Ontario, the Law Society of Upper Canada, and the Public Accountants Council for the Province of Ontario all operate licensure (exclusive right to practise) regimes.

Certification (reserved title) means a regulatory regime under which persons with the requisite qualifications are certified by a body or agency as possessing those qualifications so that they can hold out this certification to the public as a signal that indicates achievement of a particular level of competence. However, certification regimes do not prevent uncertified individuals from performing the same functions that certified individuals perform, nor do they prevent an individual who was once certified but who has had his certification withdrawn from continuing to practise in the same area. A certification regime merely prevents uncertified individuals from holding themselves out to be certified. It does not prevent them from practising under some other appellation. In the four professional areas under

study, the Society of Management Accountants of Ontario, with its R.I.A. (Registered Industrial Accountant) designation; the Certified General Accountants Association of Ontario, with its C.G.A. (Certified General Accountant) designation; and the Ontario Association of Certified Engineering Technicians and Technologists, with its C.E.T. (Certified Engineering Technician or Technologist) designation, are current examples of certification regimes.

The Staff Study provided a detailed analysis of the strengths and weaknesses of each regime. In particular, the Staff Study emphasized the formidable weaknesses of an occupational licensing system:

- i) . . . [L]icensure . . . assumes a high correlation between required training inputs and desired service outputs [an assumption that is dubious in many circumstances].
- ii) Of all the regulatory strategies surveyed, licensure introduces the most rigidities and elements of arbitrariness into a market [for professional services]. . . . [It isolates] at a given point in time certain functions as requiring licensing and prescribes certain educational and training requirements to be met as a condition for functioning in the market. In technologically dynamic market settings, this static model may, over time, exact serious social costs in terms of the impediments it creates to innovation. On the demand side of such markets, changing consumer demands, and, on the supply side, technological advances and changes in the knowledge base, will, over time, call for different configurations of skills and manpower resources. A licensing regime is unlikely, and may be unable, to keep pace with these forces.
- iii) All standard-setting mechanisms, including licensing, necessarily proceed on the assumption that quality is a discontinuous attribute. A licensing regime assumes that either one satisfies the required licensing conditions and provides a corresponding quality of service, or one does not meet the standards and is not permitted to provide any lesser quality of service on any terms. However, this assumption ignores substitution effects. From a consumer's point of view, the real choices are to buy the quality of service that conforms to or exceeds the prescribed standard, to dispense with the service entirely, or to utilize some substitute service of indeterminate quality which falls outside the licensed domain. For example, under a licensing regime for lawyers, if a consumer wishes to purchase legal services, he must buy services of a quality that satisfies the prescribed standards. If he is unwilling or unable to pay for services of that

quality, he can either dispense with the service altogether, perhaps substituting his own services by reading "how to be your own lawyer" handbooks, or rely on remote substitute services like legal advice from non-lawyer friends or businessmen or other counsellors such as social workers. It is not clear that the result produced by a licensed regime, net of the substitution effects, is an average quality of services higher than would be realized in a market not subject to licensure. The failure to regulate *all* substitutes for licensed services, no matter how remote, creates the possibility of misleading inferences being drawn by consumers about the quality of those substitutes. In this case, licensure in one market may induce imperfections in another related market. Where forces of supply and demand generate a strong market for substitutes, there will be persistent tension between suppliers in the licensed and unlicensed markets over the demarcation of the licensed territory; in this event, licensure may . . . involve an unstable political dynamic.

- iv) Even assuming away all substitution effects, consumers who purchase services that meet the prescribed standards and who would have preferred to have purchased inferior quality services at a lower price had this been possible, are thus forced to re-allocate resources away from some other area of preferred consumption into the purchase of professional services, with an unclear but probably negative impact on their general welfare.
- v) For consumers who choose to purchase services from providers who satisfy the required entry standards, licensing is a very crude quality signal. Inevitably, in the spectrum of tasks that fall into the licensed domain, some tasks are likely to call for a relatively modest degree of skill, others for very sophisticated skills. A one-level licensing regime, like a one-level certification scheme, sends a very fuzzy quality signal to consumers of professional services in relation to those services involving a level of sophistication significantly beyond the base level at which the licensing regime is directed. However, to the extent that one attempts to reflect the continuous nature of the quality attribute through multiple or hierarchical licensing tracks, the rigidities and impediments to manpower mobility inherent in any licensing scheme are correspondingly multiplied.
- vi) On the assumption that it is considered necessary and feasible to set only a single licensing standard for a given professional market, the question of where on the quality continuum that standard should be set raises formidable policy issues. To pose these issues concretely, "How 'safe' should a doctor (engineer, lawyer) be before he is let loose on the public?" "How much of society's resources is it worth

investing in further training of an aspiring doctor, for example, to increase by 10% the probability of saving one additional human life over the course of his professional career?" Unfortunately, in answering these kinds of questions, there is no way of avoiding an access-quality tradeoff, access being contingent on both the quantity and the price of services offered. Broadly speaking, the lower the quality threshold demanded of practitioners, the greater the access to the market by aspiring entrants and the greater the access to services on the part of potential demanders. The higher the quality threshold demanded of potential providers, the lesser the access to the market by aspiring entrants, and the lesser the access to services on the part of potential demanders of services. There is no policy available in this context that is capable of making all affected interests better off.

The choice of a preferred policy, reflecting as it does the choice of a preferred pattern of distribution of social costs and benefits, while assisted by a technical analysis of the nature of those social costs and benefits, is not ultimately a technical question on which any body of experts has any special claim to wisdom. This is not to say that this problem is peculiar to occupational licensing amongst the alternative strategies surveyed. For example, an unregulated professional market may hold advantages for the informed and sophisticated while imposing costs on the uninformed and unsophisticated. In other words, the social calculus called for involves not only comparing different standard-setting options within an occupational licensing regime but, obviously, comparing social costs and benefits across alternative regulatory strategies. The task of making this social calculus is not made easier by the fact that different interests win or lose in different ways under different options.

- vii) To expect of the legal system an ability to frame rules which precisely differentiate complex occupational functions either horizontally (e.g., lawyers' functions from accountants' functions; engineers' functions from architects' functions), or vertically (e.g., engineers' functions from engineering technologists' functions), may be to expect a degree of regulatory refinement that is simply unattainable.
- viii) To the extent that professional interests control or influence both the setting and enforcing of licensing standards, there is a risk that they will be set too high in order to restrict entry unduly and drive up the incomes of existing practitioners thus shielded from the competition of new entrants. The emphasis placed by most professional cultures on technical excellence over other dimensions of service quality and over issues of cost and access is likely to increase this risk.

- ix) A licensing scheme, once in place, is difficult to remove. Forms of regulation conferring windfall gains on parties (e.g., exclusive licences) typically induce early capitalization of [these] gains, so that investments by subsequent parties in the regulated sector will reflect a relatively normal rate of return. Thus, any revocation of the regulation will inflict real welfare losses, a prospect likely to be vigorously resisted by the interests in jeopardy. The ideological primacy accorded to private property rights in our society is likely to reinforce hostility to expungement of, or interference with, those rights, however created, at least without compensation. Thus, exclusive licensing laws, once enacted, tend to be politically irreversible, irrespective of their continued aptness.³

These weaknesses of an occupational licensing system suggest that licensure should be reserved for professional markets characterized by high costs of errors by providers, high information costs faced by consumers, and/or substantial and widespread adverse third party effects not fully compensable in damages.

While, with a few exceptions, we have not examined in detail the claims for enhanced professional status made to us by the groups listed earlier in this chapter, we are skeptical that any of them could satisfy these criteria for licensure. As both The Honourable J.C. McRuer in the Royal Commission Inquiry into Civil Rights in Ontario⁴ and the Committee on the Healing Arts⁵ have emphasized, the disadvantages of licensure regimes are so substantial that only the most compelling demonstration of the need for public protection should justify the creation of additional self-regulating licensure regimes. We unreservedly endorse this view. The creation of additional self-regulating licensure regimes would further balkanize professional markets, introduce additional rigidities and impediments inhibiting mobility of manpower in these markets, and render endemic the kind of demarcation disputes in which we have been embroiled during the course of our inquiry with respect to already established professions.

³See Michael J. Trebilcock, Carolyn J. Tuohy, and Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1979), pp. 78-82.

⁴Ontario, Royal Commission Inquiry into Civil Rights, *Report*, No. 1, Vol. 3 (Toronto: Queen's Printer, 1968), p. 1,162.

⁵Ontario, Committee on the Healing Arts, *Report*, Vol. 3 (Toronto: Queen's Printer, 1970), p. 63.

Given this view, we turn to certification as a major alternative to licensure. The Staff Study noted the following strengths of a certification system:

- i) It responds directly to the problem faced by an uninformed public trying to determine who is competent to do what in complex professional markets by providing information. It does this, in effect, by "grading" service providers into at least two categories, certified and uncertified practitioners, although in theory a certification system could attempt to differentiate the quality of service providers more finely by creating a variety of "grading" categories along the quality continuum. . . .
- ii) A certification system is relatively flexible. While it attempts to segregate providers in the market by providing information to consumers about relative degrees of competence or expertise, it nevertheless preserves free entry into the market, and in this respect contrasts sharply with the entry controls entailed in licensure.
- iii) Certification systems permit the possibility of allowing for competing and parallel certificates to be offered by a limited number of rival organizations, thus creating strong economic incentives for each organization to police the competence and conduct of its members in order to maintain or enhance the credibility of its certificates.
- iv) A certification system may operate as a counterweight to tendencies to concentration in a professional market. For example, a market entirely unregulated on the input side, but subject to major informational deficiencies on the demand side, may well of its own motion generate certain adjustment processes such as heavy advertising of "brand name" firms as a proxy for more specific service information desired by consumers. To the extent that a certification system provides consumers with other sources of information about the relative competence of alternate providers in the market, smaller firms may be enabled to compete with larger firms as to the quality dimension of services being offered. Thus, the competitive vigour of the market would be enhanced.
- v) In markets characterized by high levels of quality uncertainty, with consumers unable to discriminate at all efficiently between high and low quality services, high quality providers may be driven out of the market unless a means, such as certification, is made available to enable them to differentiate their product and obtain appropriate rewards for a superior product. Thus, certification may prevent the degeneration of such a market.⁶

⁶See Trebilcock, Tuohy, and Wolfson, *Professional Regulation*, *op. cit.* at n. 3, pp. 73-74.

The principal disadvantage of a certification system noted by the Staff Study is that the conferment on professional associations of a legal capacity to grant a reserved title to their members may set in motion a set of political dynamics that will tend to convert certification schemes, however desirable, into licensing schemes, however undesirable. Exclusive licensing schemes create monopolies for licensees and thus may be more attractive to any given occupation than certification schemes. Also, licensing schemes give the licensing body a large captive membership and dues-paying base. They can enhance the prestige and power of the staff bureaucracy and elected leadership of the association. Thus, certification bodies may well be tempted to look upon their certification powers as a step towards the more attractive status of licensing bodies.

C. A New Certification System for Ontario

The Staff Study proposed that, in future, conferment of professional designations through certification regimes should require enactment of an appropriate professional statute for each certifying group, specifying the powers, structures, and processes of the body awarding such designations. The powers, structures, and processes of such bodies would be closely similar to those proposed by the Staff Study for licensing bodies.⁷ Professional designations not sanctioned in this way would be prohibited.

The thinking underlying the Staff Study proposals appears to have been that in order to make certification a serious alternative to licensure, it should not be too freely available, so that a statutorily sanctioned professional designation would constitute an unambiguous quality signal in a professional market and would over time be able to establish the kind of credibility and recognition factor with the public that would make it a valuable property right. In this sense, certification would become a real alternative to licensure. Obviously, extensive proliferation of professional designations carries the potential for undermining the quality signal generated by any particular designation. This is because the public recognition factor is reduced as a result of confusion over the informational significance of a variety of competing designations.

It should be noted that in some respects the Staff Study proposals are similar to the treatment of certification by the Quebec *Professional*

⁷*Ibid.*, Proposals 7.1-7.6, pp. 239-242.

Code.⁸ Sections 26 and 27 of the Code provide that a certifying regime may be created by statute or by Letters Patent issued by the Lieutenant Governor in Council, after consultation with the Quebec Office des Professions and the Interprofessional Council (where certification is deemed to be “necessary for the protection of the public”). The Code does not articulate different criteria for the creation of licensure and certification regimes and subjects both to similar requirements as to internal structures and processes. The Office des Professions, which administers the Code, has not been much more explicit in differentiating its qualifying criteria, although it has expressed a strong preference for certification over licensure in most instances. The Code recognized twenty-one professional licensure regimes and seventeen certification regimes. This has not changed since its enactment in 1973, although the Office reports having to resist strenuous pressure from certifying bodies seeking to elevate their status to that of licensure.

We are sympathetic to much of the rationale underlying the Staff Study proposals. However, it should be realized that these proposals in large part amount to suggesting that the government do nothing in response to escalating demands for enhanced professional status. This option may not, practically speaking, be open to the government given the persistence and pervasiveness of these demands and may in fact simply encourage the wider use of “private” stratagems such as the promotion of private members’ bills, or certification under corporate bylaws, registered trademarks, or registered copyrights. Also, the Staff Study proposals and the *Quebec Professional Code* contemplate structuring self-regulating certification regimes along lines closely similar to licensure regimes, with separate statutes for each certifying body and internal processes and regulatory powers mirroring those of the established licensed professions. We are concerned that, over time, certification regimes so structured will accelerate the dynamic that seeks to convert certification regimes into licensure regimes, given the very limited formal, as opposed to functional, changes that are likely to be required in the certifying body’s statute. In our judgement, a delicate balance needs to be struck among: (a) the desire to avoid promoting demands for licensure by creating certification regimes that are too closely proximate in their formal structure to licensure regimes; (b) the desirability of responding, with due sensitivity to broader

⁸S.Q. 1973, c. 43.

public interests, to widespread demands for enhanced professional status; and (c) the need to avoid creating so permissive a set of criteria for obtaining certification regimes that the policy proves self-defeating by largely depreciating the value of certification and possibly thereby simply escalating demands for full-scale licensure once again. Reflecting as we think a reasonable balance among these considerations, *we recommend that:*

13.1 There should be enacted a general omnibus certification statute to be called “The Professional Designations Act,” this Act to:

- (a) provide for the statutory registration of professional designations in any generically described profession or occupation except that, in the case of members of a profession or occupation licensed or certified by or under any other provincial statute, consent to the registration of a professional designation should be required from the relevant certifying or licensing body or agency;
- (b) define professional designations as including such terms as “accredited,” “certified,” “chartered,” “professional,” “registered,” or like terms asserting or implying public recognition or endorsement of special membership credentials;
- (c) make it a summary offence for any person or group to use a professional designation so defined unless this designation has been duly registered under the Act;
- (d) provide for the administration of the registration scheme by a Registrar located in an appropriate ministry of the government;
- (e) empower the Registrar to grant such designation as might be applied for by any professional or occupational group in Ontario if he or she is satisfied that this designation:
 - (i) comes within the definition of a professional designation;

- (ii) is neither the same as, nor confusingly similar to, a designation previously registered under this or any other provincial statute; and
 - (iii) is proposed by an occupational group which is able to satisfy certain minimum criteria as to its internal structures and processes;
- (f) provide that the minimum criteria concerning which the occupational groups must satisfy the Registrar be its capacity to prescribe, enforce, and maintain qualification requirements, a code of ethics, a complaints procedure, and a disciplinary mechanism;
- (g) stipulate that as continuing evidence of its capacity to meet the above criteria, each registered group must submit to the Registrar a publicly available annual report, such report to set out the current elected officers of each registered group; an audited financial statement; membership statistics; and summary of complaints received against members by source and type of complaint and the disposition thereof, including a summary of any disciplinary proceedings involved;
- (h) provide for a right of appeal for any aggrieved party to the Divisional Court in respect of a decision by the Registrar to register, refuse to register, or de-register, any professional designation; and
- (i) provide for the levying of initial registration fees and annual filing fees so as to make the scheme wholly or substantially self-financing.

This recommendation contemplates fairly wide access to self-regulating certification regimes while imposing a minimum screen that we hope would be relatively simple and inexpensive to administer. By requiring that certain minimum criteria be met, we seek to avoid undue devaluation of designations. By recommending that the registration scheme be wholly or substantially self-financing, we seek to minimize the charge on government. In the case of members of a professional or occupational group already licensed or certified by or

under other provincial statutes, the requirement of the consent of the licensing or certifying body to the registration of a professional designation will ensure that private initiatives cannot undermine the regulatory responsibilities of such bodies by, for example, introducing specialty certification via the back door.

On the other hand, paraprofessional groups will be able to seek registration of designations without being subject to the veto of the “senior” profession. The Registrar, of course, will have to be satisfied that a proposed designation is not confusingly similar to designations employed by members of the “senior” profession; moreover, regulation of a designation would confer no immunity from prosecution for unauthorized practice activities. We consider that our recommendation, if implemented, will confer significant benefits on first parties (providers of professional services) by facilitating some measure of recognition of professional status. It will also confer significant benefits on second parties (users of professional services) by improving quality signals in markets for professional services.

By providing a single and exclusive route to professional certification, the availability of this form of professional credentialing would be both controlled and systematized, unlike the present situation in Ontario where occupational groups have claimed reserved titles through such expedients as trademarks and copyrights. Our proposed certification system would also extend to legally non-exclusive forms of designation, such as titles conferred under corporate bylaws. Under the system we have recommended, no professional designation may be employed unless it is registered under the proposed “Professional Designations Act.”

D. The Evaluation of Licensure Claims

For the reasons outlined in this chapter, a significant quantum leap should be entailed by any group seeking to move from certification status to licensure status. In order to evaluate the claims of any such group, a stringent screening process should be instituted. We are skeptical about the wisdom of creating a permanent agency of government, like the Office des Professions du Québec, to perform this function because of the dangers of a “lightning rod” effect that such an agency may engender. Our preferred approach is for the government to treat licensure claims with all the seriousness that is warranted

by the monopoly position that is being sought. Accordingly, the government should commit itself to a process whereby no licensure claim would be granted until after a full-fledged committee of inquiry, appointed for the purpose, has thoroughly investigated the claim and has reported publicly thereon to the Lieutenant Governor in Council.

We would expect that any such committee of inquiry would, in the course of its investigation, weigh the option of licensure against the option of certification, bearing centrally in mind the problems of reconciling new licensure regimes with the scope of the licences held by other occupational groups. In addition, in the event that licensure were found to be justified, a committee should then address whether direct government licensure or delegated self-regulatory licensure is the appropriate regulatory regime. In cases where serious public protection problems are pervasive throughout an occupational group, or where an occupational group functions primarily in the public sector, direct licensing may well be appropriate either explicitly or through a job specification system.

We expect that the screen entailed by serious Order-in-Council inquiries will constrain excessive promotion of licensure claims both because of its public character, and because the government is only likely to invoke such a process in cases of extremely serious claims, especially given the availability of the alternative certification system which we have recommended. Therefore, *we recommend that:*

- 13.2 All claims to occupational licensure should, in future, be reviewed by special committees of inquiry, appointed by Order-in-Council, charged with the responsibility of publicly investigating such claims and publicly reporting thereon to the Lieutenant Governor in Council.

Chapter 14 Summary of Recommendations

- 2.1 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the Lieutenant Governor in Council shall appoint to the governing council of each licensing body not fewer than two persons who are not members of the relevant profession.
- 2.2 The Lieutenant Governor in Council should take due note of the desirability of appointing non-professional members to professional governing bodies in such a manner as to achieve a judicious representation of allied professional, paraprofessional, employer, client, and general interests.
- 2.3 *The Professional Engineers Act* should be amended so as to delete the provision that one member of the Council be a barrister and solicitor; and *The Law Society Act* should be amended to remove the voting privileges currently vested in the Attorney General of Ontario as a Bencher of the Society.
- 2.4 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide for the establishment of a Complaints Committee and a Discipline Committee within each licensing body.
- 2.5 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide in each instance that the Complaints Committee shall review, upon request of any party to a complaint, or of the staff of the relevant professional organization, any complaint brought against a member of that organization.
- 2.6 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be revised to provide explicitly that each professional organization is solely responsible for undertaking disciplinary proceedings.

- 2.7 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should specify procedures for disciplinary proceedings, establishing rights to notice, rules of evidence, and rights to counsel, subject to the provisions of *The Statutory Powers Procedure Act*, and should provide that disciplinary orders may be appealed to the courts, on questions of law or fact, by the person against whom the order is made.
- 2.8 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the Discipline Committees of each body may require that the costs of a disciplinary proceeding be borne by a member found guilty of professional misconduct or incompetence, and that in such cases, the disciplined member may apply to the courts for a review of the cost order.
- 2.9 There should be statutory provisions to:
- (a) provide for the appointment by the Lieutenant Governor in Council of a Lay Observer charged with the duty to investigate allegations by, or on behalf of, members of the public concerning the way in which complaints against professionals are treated by the self-regulating licensing bodies in accounting, architecture, engineering, and law;
 - (b) provide that the person appointed as Lay Observer shall not be a member of any of the licensing bodies within his or her jurisdiction;
 - (c) provide that the professional organizations within his or her jurisdiction shall provide the Lay Observer with such information as he or she may from time to time reasonably require;
 - (d) provide that the Lay Observer shall report the result of each of his or her investigations to the professional organization concerned, to the complainant, and, where appropriate in his or her judgement, to the person complained against; and

- (e) provide that the Lay Observer shall submit an annual report of his or her activities in each professional area to the Legislature through the Minister to whom the administration of the relevant professional legislation may from time to time be assigned. The format of the annual report shall be at the discretion of the Lay Observer, but shall not include the names of individual parties to complaints.

2.10 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide for the creation of a Registration Committee within each professional organization and provide that any person refused admission to the respective professional organization shall be entitled to a hearing by the Registration Committee, from which an appeal would lie, on questions of law or fact, to the courts.

2.11 The statutes establishing each of the self-governing licensing bodies in the accounting, architectural, engineering, and legal professions should stipulate that no regulation made under these Acts shall come into force until it has been approved by the Lieutenant Governor in Council on the recommendation of the Minister.

2.12 *The Law Society Act* should be revised to remove reference to “rules,” and to empower Convocation to make “regulations” and “bylaws.”

2.13 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should include provisions:

- (a) establishing the respective professional organizations as corporate bodies, and establishing governing councils of these bodies, of specified size, whose professional membership is to be composed as specified in regulations under the respective Acts; and
- (b) establishing general requirements for licensure, such as age, residence, citizenship (in the case of the legal profession), the passing of a professional examination,

and the meeting of such academic and experience requirements as are specified in regulations under the respective Acts.

2.14 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should empower the governing councils of those bodies to make regulations subject to the approval of the Lieutenant Governor in Council regarding:

- (a) the academic, experience, and other requirements for admission into professional training programmes and into licensed practice;
- (b) qualifications for temporary licensure, and the conditions to be placed upon such licensure;
- (c) the curricula and standards of professional training programmes offered by the professional organization itself;
- (d) the scope and standards of any examination administered as an entry requirement by the professional organization itself;
- (e) the definition of professional misconduct and incompetence;
- (f) the content of codes of ethics;
- (g) specialty designations;
- (h) the employment of professionals in training during apprenticeship or articling periods;
- (i) the audit and inspection of members' books, accounts, and transactions;
- (j) the conducting of fee surveys, and the publication of the results therefrom;

- (k) the definition of the constituencies from which members of the respective governing councils are to be elected or appointed, and the number of representatives from each constituency;
- (l) where relevant, the definition of geographic electoral districts for elections to the governing council;
- (m) the positions of officers of the governing body and mechanisms of their selection;
- (n) the nominating and balloting procedures for intra-professional elections;
- (o) the composition of the membership of statutory committees; the mechanism of their appointment; and the procedures ancillary to those stipulated in the statute relating to their activities;
- (p) quorums for the governing council and statutory committees;
- (q) such other matters of public policy as the Legislature may deem appropriate to enumerate in the statute; and
- (r) a residual category defined as “such other matters as are entailed in carrying out the purposes of this Act.”

2.15 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide for the making of bylaws regarding matters of internal administration and services to members, for example:

- (a) property management;
- (b) banking and finance;
- (c) membership dues, and forms;
- (d) remuneration of council and committee members;

- (e) non-statutory committees;
- (f) procedures for the calling and conducting of meetings;
- (g) the establishment of, and grants to, chapters or local associations;
- (h) scholarships, lectures, and continuing education programmes;
- (i) benevolent funds;
- (j) insurance programmes;
- (k) liaison with other organizations;
- (l) the designation of honorary and associate members;
- (m) such other matters of internal administration and member service as the Legislature may deem appropriate to enumerate in the statute; and
- (n) a residual category to be defined as “such other matters as are entailed in carrying on the business of the [governing body] and are not included in the section [enumerating heads of regulation] of this Act”.

2.16 Where participation in a programme offered by a professional organization is a condition of continued retention of the right to practise, the provision of such a programme should be governed by regulations. In particular, *The Law Society Act* should be revised to provide that Convocation may make regulations governing the provision of errors and omissions insurance to its members.

2.17 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that each licensing body shall submit an annual report to the Minister, according to such format as the Minister may prescribe, for tabling in the Legislature.

2.18 The Minister(s) charged with receiving the annual reports of professional bodies should consider requiring that they include the following categories of information:

- (a) any regulations and bylaws passed by the council of the professional body;
- (b) membership statistics of the profession by size of firm, location, employment context, and areas of specialty, where appropriate;
- (c) membership statistics of the council and committees of the professional body along the same dimensions;
- (d) a summary of the complaints received against members, categorized by source, type, and disposition of complaints;
- (e) a summary of disciplinary proceedings, categorized by the nature of the charge and the characteristics of the members involved (such as size and location of firm, years in practice, areas of specialty, if relevant);
- (f) a summary of the applications for registration, categorized by place of training (and jurisdiction of previous registration, if applicable) of the applicant, and the disposition of applications;
- (g) attrition rates at various stages of qualifying programmes;
- (h) an identification of matters of policy currently under review by professional bodies and of any proposed changes in policies or programmes; and
- (i) any other information deemed relevant by the professional body.

2.19 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should stipulate that the Lieutenant Governor in Council shall cause a review of each statute, and its effects, to

be undertaken at ten-year intervals, the results to be tabled in the Legislature.

3.1 Section 50 of *The Law Society Act* should be amended by adding a provision to the effect that no prosecution shall be commenced under this section except with the consent in writing of the Attorney General.

4.1 *The Professional Engineers Act* should be amended so as to:

(a) provide that the performance of engineering work by persons who are not professional engineers shall not be a violation of the Act so long as a professional engineer is professionally responsible to the Association of Professional Engineers of Ontario for the maintenance of engineering standards in the performance of the work; and

(b) stipulate that nothing in the Act shall be construed so as to prevent:

(i) any person from engaging in testing and inspection activities, and reporting thereon, provided that the specifications and standards involved have been prepared or approved by a professional engineer;

(ii) any person from undertaking the design of special production machinery, equipment, or tools and dies for use in his or her employer's facilities in the production of the employer's products; and

(iii) any person from engaging in the repair, maintenance, or operation of the equipment and facilities of his or her employer.

4.2 *The Professional Engineers Act* should be amended so as to enable the Association of Professional Engineers of Ontario to seek from the Divisional Court a cease and desist order against any person who knowingly retains, employs, contracts with, or otherwise engages someone who is not a professional engineer

for the performance of any act or acts constituting the practice of professional engineering.

- 4.3 The Association of Professional Engineers of Ontario (APEO) and the Ontario Association of Certified Engineering Technicians and Technologists (OACETT) should establish effective consultative mechanisms whereby representatives of OACETT may be involved in the consultations between the APEO and the Canadian Accreditation Board regarding the content of the Syllabus of Examinations, and whereby representatives of OACETT may be consulted by the APEO Board of Examiners in establishing the policies to be applied in exempting engineering technologists from certain APEO examinations.
- 4.4 The Ontario Association of Architects (OAA) and the Association of Architectural Technologists of Ontario (AATO) should establish effective consultative mechanisms whereby AATO representatives may be involved in the consultations between the OAA and the Royal Architectural Institute of Canada (RAIC) regarding the design of the RAIC Syllabus Programme, and whereby AATO representatives may be consulted by the Ontario Syllabus Advisory Committee with respect to the policies to be applied in advising the RAIC Syllabus Director regarding the exemption of architectural technologists from certain Syllabus requirements.
- 5.1 The Attorney General should inform the Minister of Consumer and Commercial Relations of the desirability of reviewing at an early date what changes, if any, might be made in the provisions of the Ontario Building Code that exempt defined classes of buildings from a requirement for professional services.
- 5.2 *The Architects Act* should be amended so as to remove from the “holding out” provisions in section 16(3) the exemption for architectural work on buildings, alterations, and additions costing \$10,000 or less.
- 5.3 *The Architects Act* and *The Professional Engineers Act* should be amended so as to exclude from the definitions of licensed practice the provision of design services for buildings not requiring professional services as these buildings may be defined from time to time in the Ontario Building Code.

5.4 The drafting of any and all revisions to *The Architects Act*, *The Professional Engineers Act*, and any other legislation affecting the scope of practice in architecture and engineering should accord full respect to the freedom of choice currently enjoyed by clients in the selection of prime consultants, be these consultants within or outside the memberships of these two professions.

5.5 *The Professional Engineers Act* should be amended so as to:

- (a) make it clear that the definition of “practice of professional engineering,” notwithstanding any reference to “steel, concrete, or reinforced concrete structures,” does not include buildings other than industrial buildings or specified mixed occupancy buildings, but does include the structural, mechanical, and electrical systems for all buildings other than those which do not, by law, require any professional services;
- (b) define “industrial buildings” to include factories, warehouses and process plants, and “mixed occupancy buildings” as buildings where the major occupancy is industrial and the minor occupancy does not exceed 4,000 square feet of gross floor area; and
- (c) provide that nothing in the Act shall prevent any architect from performing professional engineering services which are incidental and ancillary to the work undertaken by such architect, provided that such incidental and ancillary services may not constitute all the engineering services being performed in relation to such work, save with respect to residential buildings not exceeding three storeys in height.

5.6 *The Architects Act* should be amended so as to:

- (a) make it clear that nothing in the Act shall prevent any professional engineer from preparing a sketch, drawing, or specification for an industrial building as defined in *The Professional Engineers Act*, or for an alteration of, or addition to, any such building;

- (b) define the practice of architecture in such a way as to exclude the structural, mechanical, and electrical systems where these form part of the definition of the practice of professional engineering in *The Professional Engineers Act*; and
- (c) provide that nothing in the Act shall prevent a professional engineer from performing architectural services which are incidental and ancillary to the work undertaken by such engineer, provided that such incidental and ancillary services may not constitute all the architectural services being performed in relation to such work.

5.7 Section 2.3.1 of the Ontario Building Code should be amended to provide that the drawings for buildings that require professional services shall be signed and sealed by a person who purports to be an architect or a professional engineer.

5.8 *The Professional Engineers Act* should be amended to enable the Association of Professional Engineers of Ontario to issue to engineering firms Certificates of Authorization in each of the following classes:

- Class A: sole proprietorships, associations of persons, partnerships, corporations, or partnerships of corporations which are primarily engaged in offering professional services to the public;
- Class B: corporations, one of whose customary functions is to engage in the practice of professional engineering but whose principal activity is not the offering of professional services to the public; and
- Class C: single project Certificates issued on a calendar year basis authorizing restricted practice under the responsibility of a licensee.

5.9 *The Architects Act* should be amended to:

- (a) enable the Ontario Association of Architects to issue Certificates of Authorization to sole proprietorships, associations of persons, partnerships, corporations, or

partnerships of corporations which are engaged in offering professional services to the public; and

- (b) require architectural firms to hold Certificates of Authorization in order to practise in corporate form.

5.10 *The Architects Act* should be amended to give the Ontario Association of Architects the same powers and responsibilities over holders of Certificates of Authorization as are currently given to the Association of Professional Engineers of Ontario under sections 20, 24, 25, and 26 of *The Professional Engineers Act*.

5.11 *The Professional Engineers Act* should be amended to provide that a Class A Certificate of Authorization be issued as of right to any sole proprietorship, partnership, corporation, or partnership of corporations that holds a Certificate of Authorization from the Ontario Association of Architects and that employs on a full-time basis one or more professional engineers who shall take professional responsibility for the engineering work.

5.12 *The Architects Act* should be amended to provide that a Certificate of Authorization be issued as of right to any holder of a Class A Certificate of Authorization from the Association of Professional Engineers of Ontario (APEO) that employs on a full-time basis one or more architects who shall take professional responsibility for the architectural work, and is:

- a proprietorship or partnership of engineers who are members of the APEO;
- a corporation owned solely by engineers who are members of the APEO; or
- a corporation in which majority ownership is held by engineers, or by engineers and architects, and minority ownership is in the hands of individuals who are *bona fide* full-time employees of the firm.

5.13 Each of *The Architects Act* and *The Professional Engineers Act* should be amended to provide that the Lieutenant Governor in Council may create a Joint Practice Board for the professions

of architecture and engineering with such membership and terms of reference as the Lieutenant Governor in Council may determine from time to time.

5.14 The Lieutenant Governor, by Order-in-Council, should constitute a Joint Practice Board for an initial period of two years with the following membership and voting procedures:

- (a) three members appointed by the Ontario Association of Architects, each of whom shall have one vote;
- (b) three members appointed by the Association of Professional Engineers of Ontario, each of whom shall have one vote; and
- (c) a chairman appointed by the Attorney General of Ontario after consultation with the two professions, who shall have a vote in the event of a tie.

5.15 The Lieutenant Governor, by Order-in-Council, should set the following as the initial terms of reference of the Joint Practice Board:

- (a) assessing applications from any firm that holds a Class A Certificate of Authorization from the Association of Professional Engineers of Ontario (APEO) and is not by legislation entitled as of right to a Certificate of Authorization from the Ontario Association of Architects (OAA);
- (b) reviewing complaints of an interprofessional nature from members of either Association or persons other than members, relative to building design practice in cases where these complaints could not be resolved by the Associations jointly or severally;
- (c) considering other matters of interprofessional relations including, for example, the coordination and publication of guidelines, standards, criteria, and performance standards in the field of building design and construction; and

- (d) recommending the grandfathering into the OAA of certain engineers who have historically provided architectural services and who have applied within one year of the constitution of the Joint Practice Board or within such further period exceeding one year as the Board may permit; and the grandfathering into the APEO of certain architects who have historically provided engineering services and who have applied on the same terms.

The Order-in-Council should stipulate that in exercising its responsibilities pursuant to the first term of reference above, the considerations that the Joint Practice Board shall take into account in deciding whether or not to recommend to the OAA that a Certificate of Authorization be issued shall include the following:

- (i) the presence of any ownership interests in the firm that could give rise to conflicts with the professional responsibilities of the firm;
- (ii) the reason(s) why the share ownership and/or control is in the hands of other than members of the APEO and/or the OAA;
- (iii) the reason(s) why the share ownership and/or control is in the hands of other than *bona fide* full-time employees of the firm;
- (iv) assurance that certification of the firm would not give rise to unauthorized practice or otherwise lead to circumvention of *The Architects Act*; and
- (v) the nationality and residence of the non-professional owners; that is, owners other than members of the OAA and/or the APEO.

In assessing the merits of the applicant in relation to the above or any other considerations, the overriding criterion shall be that the Joint Practice Board is satisfied that no significant detriment

to the public would result from the applicant's acceptance as an authorized firm.

- 5.16 If it becomes apparent to the Lieutenant Governor in Council that the Joint Practice Board, on the basis of the first two years of its existence, either has proven incapable of formulating timely and reasonable recommendations or has suffered unreasonable and arbitrary repudiation of its recommendations by the professional bodies concerned, the Lieutenant Governor in Council should appoint a majority of the Board's membership and, if necessary, propose amendments to *The Professional Engineers Act* and *The Architects Act* that would make the decisions of the Joint Practice Board binding on the professional body to which they were directed.
- 6.1 There should be enacted a statute called "The Certified General Accountants Act," this statute establishing the Certified General Accountants Association of Ontario as a reserved title organization; and *The Chartered Accountants Act* and *The Society of Industrial Accountants of Ontario Act* should continue, the latter to be known henceforth as "The Society of Management Accountants Act."
- 6.2 *The Chartered Accountants Act*, the renamed "Society of Management Accountants Act," and the proposed new "Certified General Accountants Act" should respectively empower the Institute of Chartered Accountants of Ontario, the Society of Management Accountants of Ontario, and the Certified General Accountants Association of Ontario to license the practice of public accounting in Ontario and should constitute these organizations in accordance with the structures and processes of professional self-government recommended in Chapter 2 of this Report.
- 6.3 *The Public Accountancy Act* should be repealed.
- 6.4 All Chartered Accountants who currently hold licences to practise public accounting in Ontario should be entitled as of right to hold licences from the Institute of Chartered Accountants of Ontario.

- 6.5 All Registered Industrial Accountants who currently hold licences to practise public accounting in Ontario should be entitled as of right to hold licences from the Society of Management Accountants of Ontario; any Registered Industrial Accountant licensee who is also a qualified Chartered Accountant should have the right to choose whether he or she wishes to be licensed by the Institute of Chartered Accountants of Ontario or by the Society of Management Accountants of Ontario.
- 6.6 All individuals who currently hold licences to practise public accounting in Ontario, but who are neither Chartered Accountants nor Registered Industrial Accountants, should be entitled as of right to membership in, and licences from, the Certified General Accountants Association of Ontario.
- 6.7 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should permit individuals who have the reserved title of any one of these organizations to hold the reserved title of either or both of the other organizations; but no individual should be permitted to hold a public accounting licence from more than one organization, and no organization should be permitted to issue a public accounting licence to any individual who has lost his or her licence as a result of the disciplinary proceedings of another organization.
- 6.8 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should define the scope of the public accounting licence in such a manner that it encompasses audits and non-audit reviews.
- 6.9 The licensing legislation in public accounting should stipulate that, notwithstanding any Ontario statute to the contrary, only licensees may perform public accounting functions, and should exempt the following from its requirements:
- (a) accounting or auditing services performed by employees of public authorities under enabling federal or provincial statutes; and

- (b) accounting or auditing services performed in respect of organizations incorporated under a federal statute, where the statute specifically allows auditing services to be performed by someone other than a provincially licensed auditor.

- 6.10 The licensing legislation in public accounting should not restrict the use of the general term “accountant,” but should stipulate that any person, other than a full-time salaried employee performing accounting services for his or her employer who issues for reward statements, opinions, reports, or certificates that lie outside the scope of licensed practice, shall accompany such statements, opinions, reports, or certificates with a signed disclaimer whose format is prescribed by law; failure to comply with this requirement should constitute a summary offence.
- 6.11 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should stipulate that the failure of a licensee to adhere to the recommendations of the Canadian Institute of Chartered Accountants, as set out in its Handbook, shall constitute *prima facie* evidence of professional misconduct or incompetence for purposes of disciplinary sanctions, and that such failure is to be taken by the courts as *prima facie* evidence of negligence in civil liability actions.
- 6.12 The statutes governing each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario should stipulate that no candidate for licensed practice in public accounting shall be licensed unless he or she has passed a common examination administered by the Public Accounting Licensing Admission Board.
- 6.13 There should be enacted a statute to be called “The Public Accounting Licensing Admission Board Act,” this Act to constitute a Board which would be empowered to:
 - (a) administer a common examination to individuals who have been presented by each of the Certified General

Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario as candidates for the licence in public accounting; and

- (b) advise the Minister responsible from time to time on the educational and training requirements in public accounting prescribed by each of these bodies before they are submitted to the Lieutenant Governor in Council for promulgation as regulations.

6.14 The Public Accounting Licensing Admission Board should be composed as follows:

- (a) a total of three members nominated respectively by each of the Certified General Accountants Association of Ontario, the Institute of Chartered Accountants of Ontario, and the Society of Management Accountants of Ontario;
- (b) a total of three members who are knowledgeable in finance but who are not members of any of the three accounting organizations, nominated respectively by each of the Chairman of the Council of Ontario Universities, the Chairman of the Council of Regents for the Colleges of Applied Arts and Technology, and the Chairman of the Ontario Securities Commission; and
- (c) a chairman, who is not a member of any of the three accounting organizations, appointed by the Lieutenant Governor in Council.

6.15 The Attorney General should inform the Institute of Chartered Accountants of Ontario of the desirability of transferring its functions with respect to the Uniform Final Examination, including the task of representing Ontario on the Inter-Provincial Education Committee, to the Public Accounting Licensing Admission Board, and the Attorney General should invite the Institute to enter into negotiations with the Board to effect this transfer.

- 7.1 Canadian citizenship should not be a requirement for membership in any of the self-regulating licensing bodies in accounting, architecture, or engineering, but should be required in order to practise law in Ontario.
- 7.2 The statutes establishing each of the self-regulating licensing bodies in accounting, architecture, engineering, and law should provide that all (professional and lay) members of the governing councils of these bodies should be Canadian citizens.
- 8.1 The current legal prohibitions on conducting professional practices in corporate form, where such appear in accounting, architecture, and law, should be removed.
- 8.2 The statutes establishing each of the self-regulating licensing bodies in the accounting and legal professions should be amended to:
- (a) enable these bodies to issue Certificates of Authorization to corporations which are engaged in the provision of accounting or legal services respectively;
 - (b) give these professional bodies the same powers over holders of Certificates of Authorization as are currently given to the Association of Professional Engineers of Ontario under sections 20, 24, 25, and 26 of *The Professional Engineers Act*; and
 - (c) require professional firms to hold Certificates of Authorization in order to practise in corporate form.
- 8.3 Where professional firms in accounting, architecture, and law are incorporated, they should, with the exception of mixed architectural and engineering firms dealt with in Recommendation 5.12 in this Report, be subject to the statutory requirements that:
- (a) licensed members of each profession hold a majority of the shares and comprise a majority of the directors; and
 - (b) the remaining shares and positions on the board of directors, if any, be held by *bona fide* full-time employees of the firm.

- 8.4 Notwithstanding any provision to the contrary in any other Act, the statutes establishing the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that shareholders of a professional corporation should remain liable with respect to claims arising out of the provision of professional services as if the shareholders of the corporation, including non-professional shareholders, were carrying on the professional practice as a partnership or, where there is only one shareholder, as a sole proprietor.
- 8.5 In the case of engineering practices already incorporated, the requirement that shareholders remain liable as if they were partners with respect to claims arising out of the provision of professional services should apply only to professional services provided after the date of the enactment of this provision.
- 8.6 The statutes establishing the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should provide that the relationship between a professional corporation and its clients be subject to all applicable laws relating to the fiduciary, confidential, and ethical relationships between a professional and his or her client; and that the fiduciary, confidential, and ethical relationships between a professional and his or her client be, in turn, unaffected by the fact of incorporation.
- 9.1 The proposed provisions contained in the Ontario *Discussion Paper on the Proposed Limitations Act* should be adopted, subject to an amendment providing that the maximum time period of limitation applicable to professional negligence actions be ten years from the date on which the right to bring the action arises.
- 9.2 The statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should make clear that the disciplinary processes in each profession shall apply not only to professional misconduct, but also to professional incompetence.
- 9.3 The regulation-making powers in the statutes establishing each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be amended to empower each of these professions to propose

regulations providing for the implementation of practice inspection programmes and providing for the admissibility of evidence obtained pursuant thereto in disciplinary proceedings.

9.4 In relation to professionals found guilty of disciplinary offences, disciplinary bodies should be empowered by statute to:

- (a) expel the professional;
- (b) suspend the professional from practice generally or from some field of practice;
- (c) suspend the professional from practice generally or from some field of practice, either until a specified course of studies has been completed, or until the professional has satisfied a disciplinary body of his or her competence generally or in a specified field of practice;
- (d) accept the professional's undertaking to limit his or her practice in lieu of suspension;
- (e) impose conditions on the professional's ability to practise generally or in any field (including conditions of practising under supervision; not engaging in sole practice; requiring periodic inspections by the disciplinary body or its delegate; or reporting to the body about specified matters);
- (f) direct the professional to pass a particular course, or satisfy the disciplinary body of competence in practice generally or in a particular field within a specified time, or be suspended;
- (g) direct the professional to satisfy the disciplinary body that physical handicaps, mental handicaps, or problems caused by drugs or alcohol have been overcome (with suspension in aid);
- (h) order the professional to be reprimanded, admonished, or counselled;

- (i) revoke specialty or other competence designations (either temporarily or permanently);
- (j) impose a fine on the professional;
- (k) order repayment, waiver, or reduction of professional fees in respect of work that is the subject of disciplinary proceedings;
- (l) order publication of the professional's name incidentally to any of the foregoing orders; and
- (m) make such other or ancillary orders as may be appropriate or requisite.

9.5 General periodic re-examination and mandatory education requirements should not be introduced.

10.1 The Law Society of Upper Canada should bring forward to the Attorney General, in the form of regulations subject to Lieutenant Governor in Council approval, revised Rules of Professional Conduct providing that:

- (a) every member of the Law Society be entitled to advertise such information as office hours, languages spoken, educational qualifications, professional affiliations, preferred areas of practice, representative clients (with consent), references, publications, and fees charged for initial consultations, hourly rates, or fixed fees for services;
- (b) members advertising a service, where such advertising is misleading or deceptive, be subject to the professional misconduct provisions of *The Law Society Act* and be subject to disciplinary proceedings; and
- (c) price and non-price advertising by members be confined to the print media.

10.2 In the event that such revised rules are not forthcoming in a timely fashion, *The Law Society Act* should be amended to implement Recommendation 10.1.

- 10.3 *The Business Practices Act* should be amended to include professional services.
- 11.1 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should be amended to provide, with respect to the regulation-making powers contained in each of these statutes, that regulations may be promulgated which enable the administration of fee surveys and the publication of the results therefrom.
- 11.2 The Attorney General should advise the professional bodies under review of the desirability of adopting a rule of professional conduct requiring disclosure by a professional to a client of the basis on which fees will be determined before an engagement is undertaken.
- 11.3 The statutes of each of the self-regulating licensing bodies in the accounting, architectural, and engineering professions should be amended to provide for a fees mediation mechanism.
- 11.4 The Attorney General should advise the professional bodies under review of the desirability of adopting a rule of professional conduct requiring a professional to notify a client of the availability of fees mediation or review procedures in cases where the professional is unable to resolve a fees complaint to the client's satisfaction.
- 11.5 There should be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario.
- 12.1 In considering and formulating regulations regarding the composition of governing councils and statutory committees, electoral procedures, definitions of professional misconduct, and codes of ethics, the self-regulating licensing bodies in the accounting, architectural, engineering, and legal professions should take due note of the concerns of employee professionals.
- 12.2 The provisions excluding architects and lawyers from collective bargaining under *The Labour Relations Act* and excluding engineers, architects, and lawyers from collective bargaining under *The Crown Employees Collective Bargaining Act* should be removed.

12.3 In no case should a professional self-regulating body be recognized as a bargaining agent for employee professionals.

13.1 There should be enacted a general omnibus certification statute to be called "The Professional Designations Act," this Act to:

- (a) provide for the statutory registration of professional designations in any generically described profession or occupation except that, in the case of members of a profession or occupation licensed or certified by or under any other provincial statute, consent to the registration of a professional designation should be required from the relevant certifying or licensing body or agency;
- (b) define professional designations as including such terms as "accredited," "certified," "chartered," "professional," "registered," or like terms asserting or implying public recognition or endorsement of special membership credentials;
- (c) make it a summary offence for any person or group to use a professional designation so defined unless this designation has been duly registered under the Act;
- (d) provide for the administration of the registration scheme by a Registrar located in an appropriate ministry of the government;
- (e) empower the Registrar to grant such designation as might be applied for by any professional or occupational group in Ontario if he or she is satisfied that this designation:
 - (i) comes within the definition of a professional designation;
 - (ii) is neither the same as, nor confusingly similar to, a designation previously registered under this or any other provincial statute; and

(iii) is proposed by an occupational group which is able to satisfy certain minimum criteria as to its internal structures and processes;

- (f) provide that the minimum criteria concerning which the occupational groups must satisfy the Registrar be its capacity to prescribe, enforce, and maintain qualification requirements, a code of ethics, a complaints procedure, and a disciplinary mechanism;
- (g) stipulate that as continuing evidence of its capacity to meet the above criteria, each registered group must submit to the Registrar a publicly available annual report, such report to set out the current elected officers of each registered group; an audited financial statement; membership statistics; and summary of complaints received against members by source and type of complaint and the disposition thereof, including a summary of any disciplinary proceedings involved;
- (h) provide for a right of appeal for any aggrieved party to the Divisional Court in respect of a decision by the Registrar to register, refuse to register, or de-register, any professional designation; and
- (i) provide for the levying of initial registration fees and annual filing fees so as to make the scheme wholly or substantially self-financing.

13.2 All claims to occupational licensure should, in future, be reviewed by special committees of inquiry, appointed by Order-in-Council, charged with the responsibility of publicly investigating such claims and publicly reporting thereon to the Lieutenant Governor in Council.

Appendices

Appendix A Description of Professional Organizations

A. Accounting

The practice of accounting in Ontario is currently regulated by the Public Accountants Council for the Province of Ontario (PAC) under the licensing powers given it under *The Public Accountancy Act*.¹

At the present time, licensure of new practitioners is effectively restricted to members of the qualifying body, the Institute of Chartered Accountants of Ontario (ICAO).

The history of professional accounting organizations in Ontario begins with the founding of the Institute of Chartered Accountants of Ontario in 1879. The ICAO was incorporated by Special Act of the Ontario Legislature in the 1882-83 session.

In the period 1913-1949, several federal and provincial accounting organizations were formed. These included the Certified General Accountants Association, the Canadian Society of Cost Accountants, the Certified Public Accountants Association of Ontario, the Accredited Public Accountants Association, the Society of Industrial and Cost Accountants of Ontario, and the International Accountants and Executives Corporation.

In 1947, discussion began among professional accounting groups regarding regulation of the public accounting field. The first *Public Accountancy Act* in Ontario became law in 1950.²

The Act created a Public Accountants Council charged with the issuance and revocation of licences for public accountants. The Act provided for two qualifying bodies, the Institute of Chartered Accountants of Ontario and the Certified Public Accountants Association. As well, the Act included a "grandfather" provision for lifetime licensing of individuals who had been in practice at the time of the Act but who might not meet the new prescribed standards.

¹R.S.O. 1970, c. 373.

²R.S.O. 1950, c. 302.

In 1962, amendments to *The Public Accountancy Act* were passed.³ Their purpose was to clarify the meaning of the term 'public accountant'; to change the original Act in order to accommodate a union between the Institute of Chartered Accountants of Ontario and the Certified Public Accountants Association, and to limit licences to members of the qualifying body (only the ICAO) and to those who had been licensed as public accountants in the past. In addition, licensure was made available on the basis of membership in the Certified General Accountants Association of Ontario (CGAAO) at a single point in time. Members and students of that body as of April 1, 1962 (who either before that date or subsequently passed the C.G.A. exams and met a three-year experience requirement) were eligible for licensure. Those taking out CGAAO membership after that date were not eligible. Finally, there was also a discretionary clause in the Act whereby the PAC could exempt any person from the conditions of qualification.

The Public Accountancy Act has not been amended in a major way since 1962; a 1979 amendment dealt with the matter of the licence fee. One major development since 1962, however, has been the ICAO's 1970 decision to make a university degree a prerequisite for entrance into its training programme.

The Public Accountants Council consists of fifteen members, twelve of whom are appointed by the ICAO and three of whom are elected by non-C.A. licensees. The Council grants licences, administers and enforces its rules of professional conduct, and acts against individuals or firms practising public accounting in violation of the Act. The Council is not involved in accounting education. As of September, 1979, the PAC had licensed 6,581 public accountants, of whom 6,160 were C.A.'s, 69 were C.G.A.'s, and 352 were classified as "other."

The Institute of Chartered Accountants of Ontario (ICAO) is the qualifying body for licensure in the province of Ontario. It has a statutory base in a Special Act of the Ontario Legislature.⁴ The Institute is actively involved in research and in the setting of accounting standards as part of the national C.A. organization. As of September, 1979, the Institute had 13,959 members and 4,316 students.

³S.O. 1961-62, c. 113.

⁴See *An Act to Incorporate the Institute of Accountants of Ontario*, S.O. 1882-83, c. 62.

The Certified General Accountants Association of Ontario (CGAAO) is a voluntary association of accountants working in government, industry, and public practice. It was provincially incorporated under Letters Patent in 1957,⁵ its parent organization being federally incorporated in 1913 under a private member's bill.⁶ The Association provides training programmes for members and students. As of September, 1979, the CGAAO had 3,038 members and approximately 7,281 students enrolled in its courses.

The Society of Management Accountants of Ontario (SMAO) is a voluntary organization which educates and certifies accountants who work as management accountants in industry, government, and public practice. It awards the designation "R.I.A."; that is, Registered Industrial Accountant. A provision in *The Public Accountancy Act* states that the Act does not preclude members of the SMAO from practising as industrial accountants, cost accountants, and cost consultants and accordingly associating themselves with internal financial statements, nor does it preclude members of the SMAO from issuing statements, opinions, reports, or certificates in connection with such practice. The Society has a statutory base, being first established in 1941 as the Society of Industrial and Cost Accountants of Ontario under a private member's bill.⁷ The Society's objects relate to promoting the knowledge of members involved in industrial and cost accounting and in business organization and administration. Towards this end, the Society offers courses to students and members in cooperation with universities and colleges. As of September, 1979, the Society had 4,801 members, 9,927 students, and 259 'general' (non-R.I.A.) members.

The Institute of Accredited Public Accountants of Ontario (IAPAO) is a provincially incorporated voluntary association of accountants, licensed under *The Public Accountancy Act*. It is affiliated with the Canadian Institute of Accredited Public Accountants. The Canadian Institute was formed in 1937 and the Ontario body

⁵Letters Patent, August 14, 1957.

⁶The *General Accountants Association Act*, S.C. 1913, c. 113.

⁷*An Act to Incorporate the Society of Industrial and Cost Accountants of Ontario*, S.O. 1941, c. 77. The Society's recent change of name to the Society of Management Accountants of Ontario was effected by Supplementary Letters Patent #57831 in April, 1977.

was one of its founding units. The Institute's Supplementary Letters Patent of 1963 sets out the objects of the Institute which relate to the promotion of knowledge of its members. The Institute is not expressly prohibited from conducting its own training programmes for students, but such prohibition is implied in the provision in the Letters Patent that, after 1963, membership in the Institute is restricted to persons licensed under *The Public Accountancy Act*. An application by the Institute in 1974 for Supplementary Letters Patent to remove this restriction on membership and to permit the acceptance of students graduating from the educational course of the Canadian Institute has never been acted upon. As of September, 1979, the Institute had 148 members.

B. Architecture

The practice of architecture in Ontario is currently regulated by the Ontario Association of Architects (OAA) under the licensing and self-governing powers given it under *The Architects Act*.⁸

The history of the OAA stems back to the Architectural Guild which was formed in Toronto in 1887. The OAA held its first meeting two years later. From the year 1890, when *The Architects Act*⁹ was first enacted and the OAA incorporated in this province, to the year 1931, the OAA had the power to certify its members as "Registered Architects" but not to license them in the sense of restricted rights to practise. In 1931,¹⁰ a major revision to the legislation occurred. On the one hand, a Registration Board with licensing and regulatory powers over architects was established. On the other hand, the OAA's objects were changed to relate generally to providing the means and facilities for promoting the knowledge, proficiency, high standards, and ethics of architects. In 1935, these functions were integrated within one organization, namely, the Ontario Association of Architects. *The Architects Act*¹¹ provided for two separately elected bodies: (a) the Registration Board of the OAA which has powers over admission, licensing, and discipline of members; and (b) the Council of the OAA which handles the internal administration and management of the external liaison responsibilities of the profession. In

⁸R.S.O. 1970, c. 27.

⁹S.C. 1890, c. 41.

¹⁰S.C. 1931, c. 43.

¹¹S.O. 1935, c. 90.

September, 1979, the OAA reported 2,373 members. This figure includes 1,765 architect members and a total of 608 members in the categories of honorary, associate, retired, graduate associate, and student associate.

The Association of Architectural Technologists of Ontario (AATO) is a non-statutory body, provincially incorporated in 1969. It began with ten members and has since expanded to 558 members as of September, 1979, of which 399 were technologists, 19 were technicians, and 140 were students. The AATO does not hold a reserve of title vis à vis the use of the term “architectural technologist.” It does, however, confer on its members the right to use the designation M.A.A.T.O. (Member of the Association of Architectural Technologists of Ontario). This organization’s charter creates a Council responsible for regulating the conduct of its members and providing administrative and liaison functions for the Association, and a Certification Board, which is accountable to the Council, and which handles applications for membership in the Association.

C. Engineering

The practice of engineering in Ontario is currently regulated by the Association of Professional Engineers of Ontario (APEO) under the licensing and self-governing powers given it under *The Professional Engineers Act*.¹²

The APEO was created with the passage of the first *Professional Engineers Act* in 1922.¹³ Before that date there were several voluntary associations serving the educational and professional interests of engineers. In 1919, a group of these associations created an Advisory Conference Committee to prepare and promote draft legislation for professional engineers. *The Professional Engineers Act* of 1922 provided that the APEO would regulate entrance qualifications and use of the title only; in other words, the APEO was a certifying but not a licensing body. It was not until 1937 that the APEO became the official licensing body for the profession in Ontario.¹⁴ The 1940’s and 1950’s saw some minor changes to the Act, but in 1969 major amendments served, *inter alia*, to clarify the regulatory powers of the APEO

¹²R.S.O. 1970, c. 366.

¹³S.O. 1922, c. 59.

¹⁴*The Professional Engineers Amendment Act*, S.O. 1937, c. 98.

and its Council and to bring the procedural aspects of the Act in line with the safeguards proposed in the Report of the Royal Commission Inquiry into Civil Rights (the McRuer Report).¹⁵ *The Professional Engineers Act* of 1968-69 has not been significantly amended since that date.¹⁶ As of September, 1979, the APEO had a membership of 45,142 full members, approximately 1,127 graduate engineers in training who were not yet full members, and 2,789 candidates in the examination programme. The APEO constitutes by far the largest professional organization in Ontario.

The Consulting Engineers of Ontario (CEO) is a voluntary association of Canadian owned and operated member firms in the consulting engineering profession in Ontario. The CEO is a member organization of the Association of Consulting Engineers of Canada. The Ontario association was provincially incorporated in 1975. As of September, 1979, the CEO represented 375 consulting engineering firms.

The Ontario Association of Certified Engineering Technicians and Technologists (OACETT) is a non-statutory voluntary association which was provincially incorporated in 1962. OACETT was an outgrowth of the APEO's certification programme for engineering technicians and technologists. Although a separate legal entity from 1962 onward, OACETT remained linked to the APEO in varying degrees until 1973. In that year, OACETT took over full responsibilities with respect to the admission, registration, and certification of its members. OACETT has a reserve of title with respect to the term "C.E.T." (or "CET") which is registered under the federal *Trade Marks Act*¹⁷ and may be used by certified engineering technicians or certified engineering technologists; this does not preclude others from practising in the field of engineering technology. As of September, 1979, OACETT had 10,051 members. This number included 3,512 engineering technologists, 2,626 senior engineering technicians, 2,033 engineering technicians, 1,829 associate members, and 51 students in training.

¹⁵Ontario, Royal Commission Inquiry into Civil Rights, *Report*, No. 1, Vol. 3 (Ontario: Queen's Printer, 1968).

¹⁶S.O. 1968-69, c. 99.

¹⁷R.S.C. 1970, c. T-10.

D. Law

The practice of law in Ontario is currently regulated by the Law Society of Upper Canada (LSUC) under the licensing and self-governing powers given it in *The Law Society Act*.¹⁸

The history of the Law Society goes back to the year 1797 when *An Act for the Better Regulating the Practice of the Law*¹⁹ was passed dealing with admission to practice of barristers, advocates, solicitors, and attorneys, and vesting regulatory jurisdiction in the Law Society subject to some measure of oversight from the courts.

In 1822, the Law Society was incorporated by statute, but attorneys (superior court advocates) were no longer required to be members of the Law Society and were instead subject to the supervision of the courts.²⁰ There were, however, no restrictions on a person becoming both a barrister and an attorney. The first solicitors were admitted to practice following the enactment of *The Chancery Act* of 1837.²¹ In 1857, *An Act to Amend the Law For the Admission of Attorneys* placed barristers, attorneys, and solicitors all under the control of the Law Society which thereby had to issue a certificate of fitness before practitioners would be admitted to practice.²² The profession has been fused within the Law Society ever since, with all members admitted both as barristers and solicitors.

In 1859, there was a consolidation of the various Acts regarding the Law Society in *An Act Respecting the Law Society of Upper Canada*.²³ Revisions to the Act over the next century served to develop the organization of the profession through the Law Society. A review and amendment of *The Law Society Act* occurred in 1970, primarily regarding election and discipline processes within the LSUC.

The affairs of the Law Society today are governed by its Benchers, elected by the membership, and a Treasurer (or president), elected by the Benchers.

¹⁸R.S.O. 1970, c. 238.

¹⁹37 Geo. III, c. 13.

²⁰*An Act for the Better Regulating the Practice of the Law*, 2 Geo. IV, c. 5.

²¹7 Wm. IV, c. 2.

²²20 Vict., c. 63.

²³C.S.U.C. 1859, c. 33.

The total number of lawyers licensed by the Law Society of Upper Canada as of September, 1979 was 13,230.

The legal profession is also organized through the Ontario Branch of the Canadian Bar Association (CBA), a voluntary organization with provincial branches incorporated by private Act of the federal Parliament in 1921. While the Law Society serves as the licensing and disciplinary body for lawyers in this province, the objects of the Ontario Branch of the CBA relate solely to such professional issues as advancing the science of jurisprudence, and promoting a professional identity and dialogue among lawyers. In September, 1979, there were 11,687 members of the CBA in Ontario, including 2,214 student members.

The Institute of Law Clerks of Ontario (ILCO) is a voluntary association, provincially incorporated in 1968. The Institute does not have certifying or licensing powers. The Board of Directors admits members who, except for those who are honorary or *ex officio* members, must have qualifying employment as law clerks within the definition in the Institute's bylaws. As of September, 1979, there were 312 members of the Institute.

The Metropolitan Toronto Legal Secretaries Association (Canada) (MTLSA) is a voluntary organization and membership is open to anyone employed in work of a legal nature in Ontario. The Toronto chapter was chartered in 1974 as the first Canadian chapter of the National Association of Legal Secretaries (International), which was founded in the United States over a quarter of a century ago. The objectives of the Association centre on promoting continuing education and high standards of practice and conduct. As of September, 1979, MTLSA had 82 members.

Neither the designation "law clerk" nor the designation "legal secretary" is reserved to members of any particular organization.

Other professional actors in the legal arena in Ontario include community legal clinics and other legal services organizations. Examples of these groups are Parkdale Community Legal Services, Injured Workers' Consultants, and Metro Tenants' Legal Services. Action on Legal Aid has been the umbrella organization for a number of community legal services in Toronto. The work of these groups is conducted by a combination of non-lawyer community legal workers, law students, and lawyers.

Following the release of the Report of the Grange Commission on Clinical Funding²⁴ in 1978, new regulations under *The Legal Aid Act* have been proclaimed by the Lieutenant Governor in Council,²⁵ setting up a Clinic Funding Committee, under the Ontario Legal Aid Plan; the primary function of the Committee is to establish policy and guidelines with respect to the funding of clinics. This Committee is composed of five members, three of whom are appointed by the Law Society and two of whom, by the Attorney General. At least one of the members appointed by the Law Society and one of the members appointed by the Attorney General must have been associated with a clinic. In addition to the funding responsibilities of the Clinic Funding Committee, the regulations empower the Committee (*inter alia*) to direct the staff in the development of resource and training facilities for clinics; to consult with clinics in the development of training programmes, and, where the Committee considers it advisable, to recommend funding for training programmes conducted by clinics.

E. Notaries

The practice of notaries public in Ontario is currently regulated directly by the government. Legislation governing notaries public was first enacted in 1869.²⁶ Major changes in *The Notaries Act* occurred in 1962 when provision was made to allow a notary's commission to expire every three years with a provision for re-examination and renewal.²⁷ The Act has since been amended but not in a major way.²⁸ Notaries are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General.

Lawyers wishing to become notaries can apply directly to the Official Documents Section of the Ministry of Government Services and, upon payment of a small fee, become notaries. According to the Manager of Official Documents, about 85% of Ontario's lawyers are also notaries. Non-lawyer notaries must make application for a notarial commission and must be examined by a provincial examiner. The examination is administered by a designated official in the Ministry of the Attorney General or by a district or county court judge. As of January, 1980, there were 552 non-lawyer notaries in Ontario.

²⁴Ontario, Ministry of the Attorney General, Commission on Clinical Funding, *Report* (Ontario: Ministry of the Attorney General, 1978).

²⁵Order-in-Council 226/79, May 30, 1979.

²⁶S.C. 1869, c. 6.

²⁷S.O. 1962, c. 91.

²⁸See R.S.O. 1970, c. 300.

Appendix B List of Participants in Professional Organizations Committee Liaison Meetings

Association of Architectural Technologists of Ontario
 Association of Professional Engineers of Ontario
 Canadian Association in Support of the Native Peoples
 Canadian Bar Association, Ontario Branch
 Canadian Civil Liberties Association
 Canadian Manufacturers' Association
 Canadian Council on Social Development
 Certified General Accountants Association of Ontario
 Committee of Community Legal Workers
 Committee of Ontario Deans of Engineering
 Committee of Ontario Law Deans
 Consulting Engineers of Ontario
 Consumers' Association of Canada, Ontario Branch
 Federation of Engineering and Scientific Associations
 Hamilton Law Association
 Heads of Technology in the Ontario Colleges of Applied Arts and Technology
 Institute of Accredited Public Accountants of Ontario
 Institute of Chartered Accountants of Ontario
 Institute of Law Clerks of Ontario
 Law Society of Upper Canada
 Liaison Committee of the Professional Associations of the Municipalities of Ontario
 Metropolitan Toronto Legal Secretaries Association
 National Board of Practising Architects
 Ontario Association of Architects
 Ontario Association of Certified Engineering Technicians and Technologists
 Ontario Federation of Labour
 Professional Institute of the Public Service of Canada
 Public Accountants Council for the Province of Ontario
 School of Architecture, Carleton University
 School of Architecture, University of Toronto
 School of Architecture, University of Waterloo
 Society of Management Accountants of Ontario

Appendix C List of Professional Organizations Committee Working Papers, Internal Working Documents, and Appendices to the Research Directorate's Staff Study

Working Papers*

- #1 Donald N. Dewees, Stanley M. Makuch, and Alan Waterhouse,
An Analysis of the Practice of Architecture and Engineering in Ontario
- #2 Michael Spence,
Entry, Conduct and Regulation in Professional Markets
- #3 Ellen B. Murray,
Citizenship and Professional Practice in Ontario
- #4 Peter Aucoin,
Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario
- #5 J. Robert S. Prichard,
Incorporation by Professionals
- #6 Thomas E. McDonnell,
The Tax Implications of Permitting the Business of a Profession to be Carried on Through a Corporation in Ontario
Robert Couzin,
Memorandum on the November 16, 1978 Federal Budget
- #7 John Quinn,
Multidisciplinary Services: Organizational Innovation in Professional Service Markets
- #8 Fred Lazar, J. Marc Sievers, and Daniel B. Thornton,
An Analysis of the Practice of Public Accounting in Ontario
- #9 Edward P. Belobaba,
Civil Liability as a Professional Competence Incentive

- #10 Selma Colvin, David Stager, Larry Taman, Janet Yale, and Frederick Zemans,
The Market for Legal Services; Paraprofessionals and Specialists
- #11 Barry J. Reiter,
Discipline as a Means of Assuring Continuing Competence in the Professions
- #12 Ellen B. Murray,
Transfer of Professionals from Other Jurisdictions to Ontario
- #13 Katherine Swinton,
The Employed Professional
- #14 David Beatty and Morley Gunderson,
The Employed Professional
- #15 John Swan,
Continuing Education and Continuing Competence
- #16 Theodore Marmor and William White,
Paraprofessionals and Issues of Public Regulation

*These working papers are available from the Ontario Government Bookstore, 880 Bay Street, Toronto, Ontario, Canada, M7A 1N8.

Internal Working Documents**

Linda Kahn,
"Mechanisms for the Governmental Review of Professional Legislation"

Elaine Kirsch,
"Training and Manpower in the Four Professions and Paraprofessions Under Study"

Donald Milner,
"Income Tax Return Preparers"

Donald Milner,
“Legal Mechanisms for the Protection of Professional Titles”

Donald Milner,
“Legal Service Plans”

Nina Schloesser,
“History and Organization of Notaries in Ontario”

Appendices to the Research Directorate’s Staff Study

Appendix A to the Research Directorate’s Staff Study,
“History and Organization of the Accounting Profession in Ontario”

Appendix B to the Research Directorate’s Staff Study,
“History and Organization of the Legal Profession in Ontario”

Appendix C to the Research Directorate’s Staff Study,
“History and Organization of the Architectural Profession in Ontario”

Appendix D to the Research Directorate’s Staff Study,
“History and Organization of the Engineering Profession in Ontario”

******Limited copies of these internal working documents and appendices to the Research Directorate’s Staff Study are available from The Ministry of the Attorney General, Communications Office, 18 King Street East, 18th floor, Toronto, Ontario, Canada, M5C 1C5.

Appendix D List of Organizations and Individuals Submitting Preliminary Briefs to the Professional Organizations Committee, 1976

- Abshez, Charles, B.A., M.Ed., C.G.A., R.I.A.
 Andzans, Peter, M.A., M.C.I.P.
 Association for Part-Time Undergraduate Students
 Association of Architectural Technologists of Ontario
 Association of Certified Survey Technicians and Technologists of Ontario
 Association of Ontario Land Surveyors
 Association of Professional Engineers of Ontario
 Atrill, Verne H.
 Bertrand, Robert J., Director of Investigation and Research, *Combines Investigation Act*, Department of Consumer and Corporate Affairs, Canada
 Bolton, John L.M., B.Arch. (Wits), A.R.I.B.A.
 Bzowski, C., C.E.T.
 Canadian Council on Social Development
 Canadian Institute of Surveying
 Canadian Medical and Biological Engineering Society
 Canadian Society for Chemical and Biochemical Technology
 Canadian Society of Certified Accountants
 Certified General Accountants Association of Ontario
 Committee of Ontario Deans of Engineering
 Community and Legal Aid Services Programme and The Clinical Training Committee, Osgoode Hall Law School
 Confederation College of Applied Arts and Technology
 Consulting Engineers of Ontario
 Consumers' Association of Canada, Ontario Branch
 De Freitas, E.C.
 M.M. Dillon Limited, Consulting Engineers & Planners
 Drew Warner Company
 ECE Group, Consulting Engineers
 Federation of Engineering and Scientific Associations
 R.J. Fenlon Real Estate Limited
 Finlay, J.B., Ph.D., P.Eng.
 Fischer, L., R.I.A.
 Foster Engineering Limited, Consulting Professional Engineers

Furlong, John J., P.Eng.
 Gathercole, Richard, J., Faculty of Law, University of Toronto
 Gelbloom, F.L., Ontario Land Surveyor
 Giffels Associates Limited, Consulting Engineers
 Gore & Storrie Limited, Consulting Engineers
 Greer Galloway & Associates Limited, Consulting Engineers
 Haldimand Law Association
 Halsall, Robert, P.Eng.
 Robert Halsall and Associates Limited, Consulting Engineers
 Housing and Urban Development Association of Canada, Ontario
 Council
 Institute of Chartered Accountants of Ontario
 Institute of Chartered Engineers of Ontario
 Institute of Law Clerks of Ontario
 Investment Counsel Association of Quebec
 Irwin, Donald A.
 Jones, David, Faculty of Law, McGill University
 Jones, D.L., M.Ch.E.
 Jones, F.J.H., R.I.A.
 Kembel-Ward & Associates Limited, Consulting Engineers
 Kennedy, James C., Public Accountant
 Lawes, R., C.I.M., S.M.Ch.E.
 Lefebvre, Lefebvre and Zaltz, Barristers and Solicitors
 Linden, Manuel, B.A., F.I.E.D., M.C.S.M.E., M.Ch.E., C.E.T.,
 paE.I.C.
 Lyttle, Brian B.
 Manuel, John, C.G.A.
 Metropolitan Toronto Legal Secretaries Association
 Moffat, Moffat & Kinoshita, Architects and Planners
 Municipal Engineers of Ontario
 Munro-Ploen & Associates Limited, Consulting Engineers
 Murphy, P.M., .R.I.A.
 Myers, James B., Member, Institute of Law Clerks of Ontario
 Ontario Association of Architects
 Ontario Association of Certified Engineering Technicians and
 Technologists
 Ontario Association for Environmental Management
 Ontario Association of Landscape Architects
 Ontario Building Officials Association
 Ontario Federation of Labour
 Ontario Professional Foresters Association
 Ontario Society for Training and Development

Orillia Law Association

Ospalak, Paul, DIP. ARCH. (Lond.), A.R.I.B.A., M.R.A.I.C.,
M.R.S.H.

Parker, David L.

Pegoraro, George, P.Eng.

Peto MacCallum Limited, Consulting Engineers

Pitman, Walter, President, Ryerson Polytechnical Institute

Preddie, Calvin K., P.Eng.

Project Planning Associates Limited

Public Accountants Council for the Province of Ontario

Roman, Andrew, Public Interest Advocacy Centre

Scheel, Hans Joachim, Architect, M.R.A.I.C., P.Eng.

Senathirajah, K.S., M.Sc., P.Eng.

Seyler, R.J., F.Ch.E., M.I.Mec.E., M.C.S.M.E., A.M.E.I.C.

Shepherd, Norman A., Barrister and Solicitor

Smith, Edward S., C.G.A.

Society of Industrial Accountants of Ontario

Society of Professional Engineers and Associates (Atomic Energy of
Canada Limited)

Sudbury Law Association

Gordon L. Sutin & Associates Limited

Vahtra, A., Engineering Technologist

Willis, Albert H.

M.S. Yolles & Partners Limited, Consulting Structural Engineers

Youngson, R.A., Barrister and Solicitor

Appendix E List of Organizations and Individuals Submitting Intermediate Briefs to the Professional Organizations Committee, 1977*

Architects Association of New Brunswick
 Association for Systems Management
 Association of Architectural Technologists of Ontario
 Association of the Chemical Profession of Ontario
 Association of Ontario Land Surveyors
 Association of Professional Engineers of Ontario
 Atrill, Verne H.
 Baduik, H.; Chrysdale, R.; Cowell, S.; Forbes, F.; Gray, T.; Seeley, C.;
 and Wilding, G., C.E.T.'s
 Baksh, Ahmad N.
 Baldock, E.C., C.E.T.
 Baloytis, V., C.E.T.
 Bertrand, Robert J., Director of Investigation and Research, *Combines Investigation Act*, Department of Consumer and Corporate Affairs, Canada
 Biscaps, Ojars, M.Arch., M.R.A.I.C., A.R.I.B.A.
 Bolton, John L.M., B.Arch. (Wits), M.R.A.I.C., A.R.I.B.A.
 Bosquet, R., B.A., C.E.T.
 Burgard, M.F., Barrister and Solicitor
 Canadian College of Advanced Engineering Practice
 Canadian Council of Professional Certification
 Canadian Council on Social Development
 Canadian Institute of Planners
 Certified General Accountants Association of Ontario
 Chen, Gordon K.C., P.Eng.
 Chown, B. Farrell, P.Eng., President, Digital Methods Limited
 Clinic Programme, Faculty of Law, University of Toronto
 Comartin, Joseph J., Barrister and Solicitor
 Committee of Community Legal Workers
 Conseil Interprofessionnel du Quebec
 Consumers' Association of Canada, Ontario Branch
 Consulting Engineers of Ontario
 Consulting Engineers of Ontario, Hamilton Chapter
 Cook, V.B., P.Eng.
 Crowe, Edward M., B.A.

Engineering Institute of Canada
 Este, William A., B.Sc., M.C.S.C.E., P.Eng.
 Findlay, Donald M., Q.C., Barrister and Solicitor
 Flatman, A.J., P.Eng.
 Foster, A.
 Gibson, George D., Architect, F.R.A.I.C.
 Graham, C.F.
 Heads of Technology of the Colleges of Applied Arts and Technology
 Horne, Boothe, Lyons & Wand, Chartered Accountants
 Institute of Accredited Public Accountants of Ontario
 Institute of Chartered Accountants of Ontario
 Institute of Law Clerks of Ontario
 Institute of Management Consultants of Ontario
 Interior Designers of Ontario
 Jares, Anthony, C.E.T.
 Jones, David, Faculty of Law, McGill University
 Jones, F.J.H., R.I.A.
 Keir, Robert, C.E.T.
 Kletter, J.A.T., B.Com., D.Sc.Econ., C.P.A., C.G.A., Public
 Accountant
 Law Society of Upper Canada
 MacCharles, W.J., C.E.T.
 Magrath, David J., C.E.T.
 Marcovitch, William, P.Eng., President, Quantum N.D.T.
 Metropolitan Toronto Legal Secretaries Association
 Neighbourhood Legal Services
 Newton, W.J., C.E.T., B.Tech.
 Noia, Manuel G., R.I.A.
 Ontario Association of Architects
 Ontario Association of Certified Engineering Technicians and
 Technologists
 Ontario Association of Certified Engineering Technicians and
 Technologists, Grand Valley Chapter, Region 2
 Ontario General Contractors Association
 Ontario Weekly Newspaper Association
 Pakalnis, Vic, P.Eng.
 Parsons, David, C.G.A.
 Pegoraro, George, P.Eng.
 Poizner, Martin M., B.Arch., M.R.A.I.C.
 Public Accountants Council for the Province of Ontario
 Redfern, More & Company, Chartered Accountants
 Robinson, Gerald, B.Sc., Ph.D., M.Arch., M.R.A.I.C., P.Eng.

Rounthwaite, C.F.T., F.R.A.I.C.

Sablatnig, Alois A.

Shepherd, Norman A., Barrister and Solicitor

Society of Management Accountants of Ontario

Steketee, R.P., P.Eng., President, Giffels Associates Limited

Tessis, Nathan, C.A.

Tilbe, Alfred P., B.Arch.

Tredwell, Gwen, Teaching Master, Durham College of Applied Arts
and Technology

Weir, Robert E., B.A., C.A.

Weir, W.J., P.Eng.

Wilkinson, John P., Director, Centre for Research in Librarianship,
University of Toronto

Wilson, Colin, C.E.T.

Winston, Jack, Jack Winston Designs Inc.

*While most of the Intermediate Briefs listed here were submitted to the Committee in the calendar year 1977, some were received subsequently.

Appendix F List of Organizations and Individuals Submitting Final Briefs to the Professional Organizations Committee, 1979*

Abshez, Charles, C.G.A.
 Ad Hoc Committee of Concerned Manufacturing Engineers
 Advocates' Society
 Alberta Society of Engineering Technologists
 American Association of Cost Engineers
 Anderson, W.A.R., P.Eng.
 Arden, R.S., P.Eng.; Cooper, W.J., P.Eng.; Cragg, S., P.Eng.; Forest, M.G., P.Eng.; Lopes, P.J., P.Eng.; McKinnon, B., P.Eng.; Nisbet, C.J., P.Eng.; Oberth, R., P.Eng.; and Rackham, R., P.Eng.
 Association of Architectural Technologists of Ontario
 Association of Certified Accountants (United Kingdom)/Canadian Society of Certified Accountants
 Association of Engineers of Bell Canada
 Association of Municipal Clerks and Treasurers of Ontario
 Association of Ontario Land Surveyors
 Association of Professional Engineers, Geologists and Geophysicists of Alberta
 Association of Professional Engineers of Manitoba
 Association of Professional Engineers of Newfoundland
 Association of Professional Engineers of Ontario
 Association of Professional Engineers of Ontario, Lambton Chapter
 Association of Professional Engineers of Ontario, Mississauga Chapter
 Association of Professional Engineers of Ontario, Oakville Area Chapter
 Association of Professional Engineers of Ontario, Porcupine Area Chapter
 Association of Professional Engineers of Saskatchewan
 Association of Professional Engineers of the Province of New Brunswick
 Association of The Chemical Profession of Ontario
 Association for Early Childhood Education, Ontario
 Asztalos, Andrew I., P.Eng.
 Ayer, R. Douglas, P.Eng.
 Aziz, Hanna A., C.E.T.

Barstow, Michael J., F.R.A.I.C., Chairman of the Royal Architectural
 Institute of Canada's Certification Board
 Baylis, Richard H., P.Eng.
 Berman, Joseph, P.Eng. and Waitzer, Edward, LL.B.
 Bertrand, Robert J., Director of Investigation and Research, *Combines
 Investigation Act*, Department of Consumer and Corporate Affairs,
 Canada
 Berwick, Eugene
 Bhattacharya, S. Kean
 Boychuk, E.F.
 British Columbia Institute of Technology
 Brush, L.L., P.Eng.
 Buchanan, A., B.A., LL.B.
 Cameron, J.F., P.Eng.
 Campbell, A.J., M.A.Sc., P.Eng., M.C.A.S.I., M.C.B.A.
 Canada Association of Legal Secretaries
 Canadian Association of Independent Professionals
 Canadian Bar Association, Ontario Branch
 Canadian Council of Professional Engineers
 Canadian Society for Professional Engineers
 Certified General Accountants Association of Manitoba
 Certified General Accountants Association of Ontario
 Chamot, A.
 Chapman, E.H., P.Eng.
 Chorley, George W., P.Eng.
 Colquhoun, I.L., P.Eng.
 Committee of Community Legal Workers
 Construction Specifications Canada
 Consulting Engineers of Ontario
 Consulting Engineers of Ontario, Hamilton Chapter
 Consumers' Association of Canada, Ontario Branch
 Cook, V.B., P.Eng.
 County of York Law Association
 Cuda, Tony
 Cunha, Gloria
 Curtis, Glenn H., P.Eng.
 Cuthbertson, R.S., P.Eng.
 Davis, H.A., P.Eng. and Ferguson, D.C., P.Eng.
 Day, Wilfred, LL.B.
 Dean, L., P.Eng.
 Dobbing, Peter, B.Arch.
 Dulson, J.E., P.Eng.

Dunnicliff, C.J., P.Eng.
 Dus, Ambrose, P.Eng.
 EDP Auditors Association, Toronto Area Chapter
 East Indian Professional Club
 Este, William A., B.Sc., M.C.S.C.E., P.Eng.
 Federation of Engineering and Scientific Associations
 Feldman, Kathryn, LL.B., on behalf of Clarke Munro
 Finlay, T., B.Sc., P.Eng.
 Finn, M.E., P.Eng.
 Flatman, A.J., P.Eng.
 Fleet, David G., LL.B.
 Foden, E. Bruce, C.E.T.
 Framst, Gordon E.
 Francis, Allan M., P.Eng.
 French, Stephen C.
 Furlong, Edward, M.A., C.A.
 Giffels Associates Limited, Consulting Engineers
 Government of Ontario Professional Employees Group
 Heinke, G.W., Chairman of the Department of Civil Engineering,
 University of Toronto
 Henderson, J.E., P.Eng.
 Hill, L.A., P.Eng.
 Holden, Brendan, P.Eng.
 Holden, C.P., P.Eng.
 Hopkins, George R., P.Eng.
 Housing and Urban Development Association of Canada, Ontario
 Council
 Hudspith, John C., P.Eng., M.I.C.E. (England)
 Iglinski, W.J., P.Eng.
 Institute of Accredited Public Accountants of Ontario
 Institute of Chartered Accountants of Ontario
 Institute of Chartered Secretaries and Administrators
 Institute of Law Clerks of Ontario
 Institute of Management Consultants of Ontario
 Interior Designers of Ontario
 Jones, David, Faculty of Law, University of Alberta
 Jones, F.J.H., R.I.A.
 Katsirdakis, E., C.E.T.
 Kaszuba, H.
 Kemp, Jean Johnston
 Kennedy, James C., Public Accountant
 Kirik, Mart, P.Eng.

Kirkby, Peter

Kletter, J.A.T., B.Com., D.Sc.Econ., C.P.A., C.G.A., Public Accountant

Lahde, Kai R., B.A., C.E.T.

Law Society of Upper Canada

Lawrence, R.D.

Lawry, Reva

Lecke, Fred, President of the Student Administrative Council,
Lambton College of Applied Arts and Technology

Legget, Robert F., O.C., D.G.Sc., D.Eng.

Lynch, J.A.M., P.Eng.

McKinnon, Bruce C., B.A., C.F.T.C.

McLaren, Ronald

McRostie, G.C., P.Eng.

Madisso, W., Dipl. Eng., P.Eng.

Madsen, Jay S.

Maduri, Roy, A.P.A.

Manitoba Society of Certified Engineering Technicians and Technologists Inc.

Metropolitan Toronto Legal Secretaries Association

Monsour, Nick, P.Eng.

Mowatt, Ralph, P.Eng.

O, Alexander

Ogilvie, Noel, Lay Benchers of the Law Society of Upper Canada

Ontario Association of Architects

Ontario Association of Certified Engineering Technicians and Technologists

Ontario Association of Certified Engineering Technicians and Technologists, Grand Valley Chapter

Ontario Association of Landscape Architects

Ontario Association of Professional Social Workers

Ontario Dental Association

Ontario Dental Hygienists' Association

Ontario General Contractors Association

Ontario Institute of Quantity Surveyors

Ontario Ministry of Health

Ontario Professional Foresters Association

Ontario Veterinary Association

Pakalnis, Vic, P.Eng.

Park, F.S., P.Eng.

Paul, Frank

Paul, John M., C.E.T.

Pegoraro, George, P.Eng.
 Peterson, Lyle H.W., C.A.
 Petranik, Helga
 Piccinin, Nillo A., Society of Single Fathers
 Privora, F.J., P.Eng.
 Przygoda, Z., D.Sc., F.E.I.C., P.Eng.
 Public Accountants Council for the Province of Ontario
 Ross, Ian D., P.Eng.
 Royal College of Dental Surgeons of Ontario
 Russek, R.M., P.Eng.
 Ryerson Polytechnical Institute, Technology Division
 Sablatnig, Alois A.
 Sampson, John B.
 Sands, N.S.
 Semchishin, Eugene, P.Eng.
 Sentance, Larry, P.Eng.
 Short, D. Perry, B.Arch., A.R.I.B.A., M.R.A.I.C.
 Sipkoi, Stephen L., P.Eng.
 Society of Engineering Technologists of British Columbia
 Society of Management Accountants of Ontario
 Soderman, W., C.E.T.
 Starr, C.F., P.Eng.
 Steketee, R.P., P.Eng., President, Giffels Associates Limited
 Sweers, Leo, P.Eng.
 Taylor, John C., P.Eng.
 Toronto Law Firm Librarians
 Tredwell, Gwen, Teaching Master, Durham College of Applied Arts
 and Technology
 Walker, R.L., P.Eng.
 Whatmough, Grant A.
 White, W.R., P.Eng.
 Whittall, R.L., P.Eng.
 Zucker, Ernest, P.Eng., M.E.I.C.

*While most of the Final Briefs listed here were submitted to the Committee in the calendar year 1979, some were received subsequently.

Appendix G List of Organizations and Individuals Making Oral Presentations at the Professional Organizations Committee's Public Meetings, May and June, 1979

Ad Hoc Committee of Concerned Manufacturing Engineers
Advocates' Society
Allen, D., C.E.T.; Alton, J., C.E.T.; Bradbury, G., C.E.T.; and Teravich, J., C.E.T.
American Association of Cost Engineers
Association of Certified Accountants (United Kingdom)/Canadian Society of Certified Accountants
Association of The Chemical Profession of Ontario
Association of Architectural Technologists of Ontario
Association for Early Childhood Education, Ontario
Association of Professional Engineers of Ontario
Association of Professional Engineers of Ontario, Oakville Area Chapter
Asztalos, Mrs. Julia, on behalf of Mr. Andrew I. Asztalos, P.Eng.
Ayer, R. Douglas, P.Eng.
Aziz, Hanna A., C.E.T.
Barstow, Michael J., Chairman of the Royal Architectural Institute of Canada's Certification Board
Beatty, Mr. and Mrs. W.
Bertrand, Robert J., Director of Investigation and Research, *Combines Investigation Act*, Department of Consumer and Corporate Affairs, Canada
Brisson, J.W., P.Eng.; Jorgensen, E., P.Eng.; and Steketee, R.P., P.Eng.
Boychuk, E.F.
Canadian Association of Independent Professionals
Canadian Bar Association, Ontario Branch
Canadian Council of Professional Engineers
Canadian Society for Professional Engineers
Certified General Accountants Association of Ontario
Committee of Community Legal Workers
Construction Specifications Canada
Consulting Engineers of Ontario
Consulting Engineers of Ontario, Hamilton Chapter
County of York Law Association
Federation of Engineering and Scientific Associations

East Indian Professional Club

Forest, M., P.Eng.

Foden, E. Bruce, C.E.T.

Government of Ontario Professional Employees Group

Heinke, G.W., Chairman of the Department of Civil Engineering,
University of Toronto

Hood, John

Interior Designers of Ontario

Institute of Accredited Public Accountants of Ontario

Institute of Chartered Accountants of Ontario

Institute of Law Clerks of Ontario

Institute of Management Consultants of Ontario

Law Society of Upper Canada

Kennedy, James C., Public Accountant

Lipman, Steve

MacKinnon, Bruce C., B.A., C.F.T.C.

MacMurchy, Dougald

Madisso, W., Dipl. Eng., P.Eng.

Madsen, Jay S.

Metropolitan Toronto Legal Secretaries Association

Meyers, E.

Monsour, Nick, P.Eng.

Moore, Floyd, C.E.T. and Spence, Walt, C.E.T.

Mossman, Mary Jane, Manager, Clinic Funding Committee, Ontario
Legal Aid Plan

Ontario Association of Architects

Ontario Association of Certified Engineering Technicians and
Technologists

Ontario Association of Landscape Architects

Ontario Association of Professional Social Workers

Ontario Dental Hygienists' Association

Ontario General Contractors Association

Ontario Institute of Quantity Surveyors

Ontario Land Surveyors

Ontario Professional Foresters Association

Ontario Veterinary Association

Paul, Frank

Paul, John M., C.E.T.

Petranik, Helga

Public Accountants Council for the Province of Ontario

Royal College of Dental Surgeons

Sipkoi, Stephen L., P.Eng.

Smith, Edward S., C.G.A.

Society of Management Accountants of Ontario

Waitzer, Edward, LL.B.

Wilson, Colin, C.E.T.

Whatmough, Grant A.

Zucker, Ernest, P.Eng., M.E.I.C.

Appendix H Text of Letters from The Honourable R. Roy McMurtry, Attorney General for Ontario, to Mr. J.E. Benson, P.Eng., President of the Asso- ciation of Professional Engineers of Ontario, and Mr. Irving Rayman, MRAIC, President of the Ontario Association of Architects, June 12, 1979

June 12, 1979

| | |
|---|--|
| <p>Mr. J.E. Benson, P.Eng., President, Association of Professional Engineers of the Province of Ontario, 1027 Yonge Street, Toronto, Ontario.</p> | <p>Mr. Irving Rayman, MRAIC, President, Ontario Association of Architects, 50 Park Road, Toronto, Ontario.</p> |
|---|--|

Dear Mr. Benson / Mr. Rayman:

This will acknowledge receipt of your letter of June 7, 1979, and the joint request of the Association of Professional Engineers of the Province of Ontario and the Ontario Association of Architects that the Professional Organizations Committee be permitted to meet privately with representatives of the two professional governing bodies for the purpose of seeking a settlement of issues involving the two professions which are now being considered by the Committee. I am pleased to give my assent to this proposal under the following conditions:

- i) that the members of the Committee are prepared to assume this increased responsibility;
- ii) that the government not be bound in any way by any settlement arrived at between the parties;
- iii) that the Committee not be bound in any way by any settlement arrived at between the parties; and
- iv)* that if, at any time, the Committee concludes that the parties are not progressing towards a settlement of the issues, it shall have the right to abort the meetings and withdraw therefrom.

Your letter indicates that the issues to be considered at such meetings shall include the following:

1. The jurisdictional dispute between architects and professional engineers.
2. Prime Consultancy.
3. The proposal of the APEO that on any building of account both an architect and a professional engineer shall be engaged.
4. The Building Code (Section 2.3.1).
5. The definition of “building” and of “practice of architecture.”
6. Mutual exclusion clauses.
7. Corporate practice provisions.

I am informed by the Committee that you are already aware of the reservations which they harbour with respect to paragraph 3 above.

Please convey to your colleagues my best wishes for a happy and expeditious resolution of the issues.

Yours very truly,

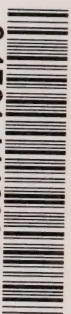
R. Roy McMurtry,
Attorney General

①

847 2

**PLEASE DO NOT REMOVE
CARDS OR SLIPS FROM THIS POCKET**

UNIVERSITY OF TORONTO LIBRARY



3 1761 11469064 7